IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 76-1845

EX PARTE: SHEARN MOODY, JR.,
Petitioner,

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. _____

EX PARTE: SHEARN MOODY, JR.
Petitioner,

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

Petitioner Shearn Moody, Jr. respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Alabama entered on January 25, 1977, refusing to set aside an adjudication that the Petitioner had failed to purge himself of contempt. This case involves important questions as to the denial of the Petitioner's right to due process of law under the Fourteenth Amendment as well as the denial of the Petitioner's rights under the First Amendment to the United States Constitution.

OPINIONS BELOW

The Opinion of the Alabama Supreme Court denying the Petitioner's Petition for Writ of Certiorari in the Alabama Supreme Court appears in Appendix A following this Motion. The Opinion of the Alabama Supreme Court refusing to consider the Petitioner's Application for Rehearing appears in Appendix B.

JURISDICTION

The Judgment of the Alabama Supreme Court was entered January 25, 1977. A timely Application for Rehearing was rejected on February 22, 1977. A timely Motion for Extension of Time to File Petition for Writ of Certiorari was filed by Petitioner and granted by Order of The Honorable Lewis F. Powell dated April 17, 1977, which Order extended the Petitioner's time for filing this Petition to and including June 24, 1977. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3) (1970).

QUESTIONS PRESENTED

1. Whether under the Fourteenth Amendment to the United States Constitution, Petitioner Shearn Moody, Jr. was denied due process of law when the Alabama trial court conducted a hearing and entered a money judgment against him for failure to purge himself of civil contempt in the absence of:

(a) a Complaint, Petition or Prayer notifying the Petitioner of the claim to be litigated, including information about the claim;

(b) a hearing based upon proper notice and conducted at a time which afforded the Petitioner an opportunity to present evidence and argument;

(c) a judgment entered in accordance with proper notice and hearing.

2. Whether the Petitioner was denied due process of law under the Fourteenth Amendment to the United States Constitution by the Alabama Trial Court's rendition of the judgment dated November 1, 1976 finding that the Petitioner had failed to purge himself of civil contempt by failing to comply with,

inter alia, conditions (e) and (h) set forth in its April 30, 1975 decree, which conditions the Petitioner was unable to comply with.

3. Whether Petitioner Moody's First Amendment right of freedom of association and his Fourteenth Amendment right to due process of law were violated by Paragraph (g) of the trial court's order of April 30, 1975, requiring Moody to purge himself of civil contempt by terminating completely the employment of certain attorneys named in the order, which attorneys were employed on Moody's behalf in cases *other than* the case which was the subject matter of the contempt order, and by the trial court's judgment of November 1, 1976, assessing damages against Moody for allegedly failing to comply with Paragraph (g) of said order.

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any

State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

Alabama Constitution of 1901.

Art. I §10: That no person shall be barred from prosecuting or defending before any tribunal in this state, by himself or counsel, any civil cause to which he is a party.

STATEMENT OF THE CASE

The parties to the State Court proceeding were Shearn Moody, Jr., ("Moody") the Petitioner herein; Protective Life Insurance Company, ("Protective") an Intervenor below; and Charles H. Payne, Commissioner of Insurance of the State of Alabama, as Receiver for Empire Life Insurance Company of America, domiciled in Alabama.

In 1972, the then Honorable John G. Bookout, Commissioner of Insurance of the State of Alabama, ("Receiver") filed a Complaint against Empire Life Insurance Company of America ("Empire") to have it placed in receivership by the Alabama Circuit Court of Jefferson County, Equity Division. The Receiver's action was instituted under the Uniform Insuror's Liquidation Act, Title 28A, Chapter 28, Code of Alabama 1940 (1958 Recompilation Supplement). Protective and Moody were allowed to intervene in that receivership and liquidation proceeding, the case being designated as Case No. 171-687 by the Trial Court. A Decree was rendered in that proceeding on June 14, 1974, finding that Empire could not be rehabilitated

and ordering its liquidation.[1] A part of the June 14, 1974 Order provided that the Receiver accept and execute a proposal by Protective for the reinsurance of Empire's policies. The Protective proposal for reinsurance, as amended, was, pursuant to the June 14, 1974 Order, ordered accepted and executed by the Receiver.

On January 6, 1975, the trial court entered a permanent injunction enjoining Moody from filing or aiding in the filing of any lawsuit, complaint, or legal claim, or any amendment to any complaint or legal claim, which related to the Empire receivership or the implementation of any order or decree of the receivership court, without the prior approval of the receivership court. On March 10, 1975, the trial court entered an order finding Moody to be in civil contempt of the January 6, 1975, decree for allegedly participating in the prosecution of *Allmon v. John G. Bookout, et al.*, Cause No. CA 74-377-N filed by Willie Allmon on November 22, 1974 in the Middle District of Alabama [hereinafter "*Allmon*"]. Petitioner Moody subsequently filed a Petition for Writ of Mandamus and other relief in the Alabama Supreme Court complaining of the March 10, 1975 order. In response thereto, on April 23, 1975, the Alabama Supreme Court issued a show cause order to the trial court requiring it to set forth the conditions by which Moody could purge himself of civil contempt.

By order entered by the trial court on April 30, 1975, the court vacated its March 12, 1975 order, adjudicated Moody to

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[1]Moody appealed the Order of June 14, 1974, and the Alabama Supreme Court affirmed the Decree on February 11, 1977. Moody timely filed an Application for Rehearing on February 25, 1977, which Application was denied by the Alabama Supreme Court on April 22, 1977.

be in civil contempt of the receivership court for having failed to obey the January 6, 1975 injunction, and set forth numerous conditions by which Moody could purge himself of civil contempt. See Exhibit 3 to Appendix D.

The conditions set forth in the Order required Moody, in part, to do the following: Paragraph (e) required Moody to require certain named persons to file sworn statements with the court providing information as to their participation in the *Allmon* case. Paragraph (g) required Moody to discharge any attorney who had anything to do with the *Allmon* case, and Paragraph (h) required Moody to appear before the trial court on May 12, 1975, which he did in fact do, and at such other times as the court may direct.

On June 16, 1976, the trial court *ex mero motu* ordered Moody to appear before it on July 19, 1976, to demonstrate that he had purged himself of civil contempt and had fully complied with the April 30 order. See Exhibit 2 to Appendix D. No pleadings were filed by the parties framing issues for the July 19th hearing, the Trial Court stating that it wanted no pleadings filed:

> After a hearing, consideration, and ruling by this Court, I do not want any further pleadings filed by anybody in this case relative to this contempt hearing. I will accord anybody that wants to furnish this court with briefs and memoranda based upon what has happened, and will happen up to the termination of his hearing today, that's all that I will receive.
> [Record 978-979]

At the commencement of the July 19th hearing, Mr. Roy Cohn of the New York Bar was introduced to the Trial Court by

Drayton N. James, local counsel for the Petitioner. The trial court permitted Mr. Cohn to appear on Moody's behalf and Mr. Cohn presented an affidavit from E. B. Vogelpohl, Jr., M.D. of Galveston, Texas, which certified that the Petitioner was ill and unable to appear before the trial court on the date of the hearing. Mr. Cohn respectfully moved orally for a continuance of the hearing to a date at which the Petitioner would be physically able to appear and testify on his own behalf. The trial court denied the Motion and ordered that the hearing proceed. The trial court indicated at the outset that the burden of proof was on Moody to purge himself of contempt. Moody offered into evidence five Exhibits consisting of certain correspondence to show compliance with the conditions set forth in the April 30, 1975 Order of the trial court. The trial court however sustained the objections of Protective and excluded these exhibits.

Following the conclusion of the hearing on July 19, 1976, the trial court permitted the parties one week to file briefs. Petitioner Moody filed a Memorandum Brief in which he asserted that he had not been given sufficient time to prepare his case and to engage in discovery to the extent necessary to enable him to examine and prepare a response to the documents offered into evidence by Protective. See Appendix C. Further, Petitioner Moody attacked the trial court's denial of his attorneys' request for a continuance because of the illness of Moody and his inability to attend and to respond personally to the charges made by Protective. Petitioner Moody also attacked condition (g) of the April 30, 1975, Order requiring him to terminate the employment of certain attorneys named therein in cases other than *Allmon v. Bookout* which was the subject matter of the contempt decree. Moody asserted that the order

was overbroad and violated his First Amendment right of freedom of association and his Fourteenth Amendment right to due process of law.

The matter was taken under advisement and thereafter the Judgment appealed from was entered on November 1, 1976. See Exhibit 1 to Appendix D. The Judgment appealed from makes numerous findings of fact and concludes with the following adjudications:

1. That Moody has failed to purge himself of civil contempt with the trial court;

2. That Moody has failed to comply with paragraphs (c), (e), (g), (h) and (j) of the Order of the trial court entered on April 30, 1975;

3. That Moody is ordered to pay Protective and the Receiver all costs, damages and expenses incurred by them as a result of the Defendant's failure to purge himself of civil contempt.

4. That Moody is ordered to pay all costs and expenses incurred by Protective in the investigation, preparation for, and conduct of civil contempt proceedings, including the July 19, 1976, proceeding.

Moody gave Notice of Appeal from the November 1, 1976, Judgment on November 23, 1976, and said Appeal is pending before the Alabama Supreme Court. As an alternative method of reviewing the Judgment, Petitioner also filed a Petition for Writ of Certiorari in the Alabama Supreme Court on November 23, 1976, which Petition for Certiorari was denied on January 25, 1977, and constitutes the basis for the Petitioner's writ filed with this Court. In the Petitioner's writ of certiorari below the Petitioner attacked the trial court's finding that the Petitioner had failed to purge himself of civil contempt by failing to comply with the conditions set forth in the April 30, 1975 decree, and questioned the validity of the trial court's assessment of monetary damages, costs, expenses and attorneys fees against the Petitioner in the civil contempt proceeding conducted on July 19, 1976. See Appendix D.

REASONS FOR GRANTING THE WRIT

I.

PETITIONER SHEARN MOODY, JR. WAS DENIED DUE PROCESS OF LAW WHEN THE ALABAMA TRIAL COURT CONDUCTED A HEARING TO DETERMINE WHETHER HE HAD PURGED HIMSELF OF CIVIL CONTEMPT WITHOUT PROVIDING HIM WITH

A. NOTICE AND INFORMATION AS TO THE CLAIMS TO BE LITIGATED, AND

B. A HEARING CONDUCTED AT A TIME WHICH AFFORDED THE PETITIONER AN OPPORTUNITY TO PRESENT EVIDENCE AND ARGUMENT.

The July 19, 1976, hearing at which the Petitioner was ordered to appear and establish that he had complied with the conditions set forth in the trial court's order of April 30, 1975 [Exhibit 3 to Appendix D], and had thereby purged himself of contempt, was obviously not a traditional judicial proceeding. It was based on no pleadings filed by the parties asserting claims and defenses or demanding any relief. On June 16, 1976, the trial court simply entered an order *ex mero motu* [See, Exhibit 2 to Appendix D] directing Moody to appear on July 19, 1976, and "demonstrate to the court" that he had purged himself of civil contempt and that he had "fully complied with"

the trial court's order of April 30, 1975.

The only pleading or citation filed or issued in connection with the July 19, 1976 hearing was the June 16 order. This order obviously did not sufficiently notify the Petitioner of any charges that he had made no attempt to comply, or that he had totally failed to comply with the April 30, 1975 order, nor did the order notify the Petitioner that damages would be assessed against him if the Court found that he had made no effort to comply or had totally failed to comply with the order.

In *Cooke v. The United States,* 45 S.Ct. 390, 267 U.S. 517 (1925), this Court held that when ever an individual is charged with indirect contempt, that is contempt not in open court, there is no right or reason in dispensing with the necessity of charges and the opportunity of the accused to present his defense by witnesses and argument. Indeed this Court held that: "Due process of law, therefore, in the prosecution of contempt, except of that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation." *Cook* at 45 S.Ct. 395; 267 U.S. 537.

In *In Re Oliver*, 68 S.Ct. 499, 333 U.S. 257 (1948), a witness was summarily convicted of contempt of court for refusing to answer questions and was ordered confined in jail for a period of not less than 60 days or until he agreed to appear and answer certain questions. In reversing the judgment of contempt, this Court held that:

> . . . failure to afford the Petitioner a reasonable opportunity to defend himself against the charges of false and evasive swearing was a denial of due process of law. A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense — a right to his day in court — are basic in our system of jurisprudence, and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel. [*In Re Oliver*, 68 S.Ct. 507-8; 333 U.S. 273]

Similarly, in the present action, the Petitioner, as a matter of due process of law, was entitled to notice as to whether he was being charged with making no effort to comply with the April 30, 1975 decree, or that he had totally failed to comply therewith. At a minimum, the Petitioner was entitled to notice of the specific portions of the April 30, 1975, decree with which he had allegedly failed to comply, as well as a reasonable opportunity to appear and establish that he had in fact complied with the court's decree.

At the hearing conducted on July 19, 1976, Petitioner's counsel, Mr. Roy Cohn, appeared and orally moved for a continuance on the ground that the Petitioner was too ill to appear before the court and testify in his own behalf. Petitioner's counsel presented the affidavit of the Petitioner's personal physician in support of the motion for continuance. The trial court nonetheless denied the motion and ordered that the hearing proceed. The Petiitoner Moody submits that the trial court's denial of his motion for a continuance denied him due process of law since he was unable to appear and provide testimonial contradiction to the evidence produced by Protective and Receiver at the hearing.

The order of November 1, 1976, [See Exhibit 1 to Appendix D] entered as a result of the July 19, 1976 hearing and

finding that the Petitioner had failed to purge himself of civil contempt appears to be more than a contempt decree since it also awards damages. It appears, in effect, to be a final money judgment leaving open only the determination of the amount of damages to be awarded. The November 1, 1976, decree therefor is in the anomalous posture of being a money judgment based upon no complaint, petition or prayer of any claimant. The judgment in itself seems to violate a fundamental concept of due process — that a party is entitled to notice and a reasonable opportunity to be heard before he can be deprived of life, liberty or property.

The Fourteenth Amendment of the United States Constitution guarantees due process of law to parties in state court proceedings. A money judgment may not be rendered against a party unless he has been afforded due process of law. Due process of law, in the setting of a civil case, requires the following:

1. Notice of the claim asserted, including information about the claim.

2. A hearing based upon the notice given with an opportunity to present evidence and argument.

3. A judgment entered in accordance with that notice and hearing.

Goss v. Lopez, 419 U.S. 565 (1975); *Schroeder v. New York*, 371 U.S. 208 (1972); *Mulhane v. Central Hanover Bank and Trust Company*, 339 U.S. 306 (1950); *Simon v. Craft*, 182 U.S. 427 (1900); *Vernon v. State*, 245 Ala. 633, 18 So. 2d 388 (1944); *Garrett v. Reid*, 244 Ala. 754, 13 So. 2d 97 (1943).

The portion of the November 1, 1976, judgment assessing liability for monetary damages against the Petitioner obviously fails to comply with the requirements of due process. No pleadings were filed by the parties who had judgments rendered in their behalf. The only notice provided to the Petitioner was the June 16, 1976 order which failed to even hint that liability for monetary damages would be assessed against the Petitioner if he failed to establish that he had complied with the conditions set forth in the April 30, 1975 decree. Notice of one claim and the rendition of a judgment upon another violates all principles of sense and justice. *Kirkland v. Pilcher*, 174 Ala. 170, 57 So. 46 (1911). Notice and justice are the essence of due process. The rendition of the November 1, 1976 judgment assessing monetary damages against the Petitioner clearly involved a taking of his property without due process of law.

Finally, Paragraph (e) of the order of April 30, 1975, required the Petitioner to "require" several persons to immediately furnish to him sworn statements setting forth in detail the amount of all fees received by them from the Petitioner since November 1, 1974, the amount of all funds expended which relate to the *Allmon* action, and the purpose for which such expenditures were made. The Petitioner's counsel attempted to offer into evidence at the July 19 hearing, copies of correspondence from Petitioner to some of these parties inquiring about the matter set out in this portion of the April 30, 1975 order. The trial court however sustained the Receiver and Protective's objections to this offer of evidence.

By refusing to allow this correspondence into evidence, the trial court clearly denied the Petitioner the right to show that he had attempted to comply with the court's decree. Every party has the right to be heard, to present evidence and to rebut charges made against him in legal proceedings. ALABAMA CONSTITUTION of 1901, Art. I, §10; *McCollum v. Birmingham Post*

Company, 259 Ala. 88, 65 So.2d 689 (1953). Petitioner was clearly denied due process of law by being denied the right to establish that he had in fact made an effort to comply with the conditions set forth in the April 30, 1975 decree. The refusal of the offered evidence amounts to a denial of the Petitioner's right to show mitigating or extenuating circumstances.

II.

AS A MATTER OF DUE PROCESS OF LAW WHEN AN INDIVIDUAL IS UNABLE TO COMPLY WITH A COURT DECREE, HE CANNOT BE ADJUDGED TO BE IN CONTEMPT OF COURT IN CONNECTION THEREWITH.

Paragraph (e) of the April 30, 1975 decree required the Petitioner as a condition for purging himself of contempt to require certain named persons to file sworn statements pertaining to their participation in the *Allmon* case. This condition calls upon the Petitioner to perform what may be an impossibility. The Petitioner had, and indeed has, no power to compel the persons named to do what the trial court ordered. Petitioner did obtain such affidavits from some of the persons but was unsuccessful in attempting to secure statements from all of such persons. Indeed, when the Petitioner attempted to introduce exhibits as to his attempt to comply with paragraph (e) the offered exhibits were denied admission by the trial court into evidence. As a matter of due process of law, a contempt judgment cannot be rendered against a party for failure to perform an act which the party cannot perform. As this Court indicated in *McNeil v. Director, Patuxent Institution*, 407 U.S. 245, 251 (1971): "Civil contempt is coercive in nature, and consequently there is no justification for confining on a civil contempt hearing

a person who lacks the present ability to comply." Where a court is not satisfied of the factual ability of the accused to make compliance, no contempt order should issue. *Maggio v. Zeitz*, 333 U.S. 56 (1948); *See also, Oriel v. Russell*, 278 U.S. 358, 366, 49 S. Ct. 173 (1929); *Sheehan v. Hunter*, 133 F.2d 303 (8th Cir. 1943); *Toplitz v. Walser*, 27 F.2d 196 (3rd Cir. 1928); *Re Rosser*, 101 F. 562, 566 (8th Cir. 1900).

Paragraph (h) of the April 30, 1975 decree required the Petitioner to appear before the trial court on May 12, 1975, and at such other times as the court may direct. The Petitioner did in fact appear before the court on May 12, 1975 and his deposition was taken on that date. The only other date upon which the Petitioner failed to appear was at the hearing on July 19, 1976, which failure to appear was clearly excusable by virtue of the Petitioner's ill health. Accordingly, the Petitioner submits that the November 1, 1976 decree finding the Petitioner to be in civil contempt of court for failing to comply with the foregoing conditions is contrary to due process of law because of the Petitioner's inability to comply with said conditions.

III.

REQUIRING THE PETITIONER TO PURGE HIMSELF OF CIVIL CONTEMPT BY TERMINATING COMPLETELY THE EMPLOYMENT OF CERTAIN ATTORNEYS, WHICH ATTORNEYS WERE EMPLOYED ON THE PETITIONER'S BEHALF IN CASES OTHER THAN THE CASE WHICH WAS THE SUBJECT MATTER OF THE CONTEMPT ORDER, VIOLATED THE PETITIONER'S FIRST AMENDMENT RIGHT OF FREEDOM OF ASSOCIATION AND HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS OF LAW.

Paragraph (g) of the April 30, 1975 decree [See Exhibit 3 to Appendix D] requires the Petitioner to purge himself of contempt by terminating immediately all employment of certain attorneys designated in the order. The Petitioner submits that the order is overbroad in that it requires as a condition to the Petitioner's purging himself of contempt that he terminate all further representation by the designated attorneys in cases other than *Allmon v. Bookout, supra*, the subject matter of the contempt order. Petitioner submits that under the constitution of the United States as well as under the laws of the state of Alabama, that he has the right to be represented in cases other than the *Allmon* case by attorneys of his own choice. The Petitioner further submits that he cannot be subjected to a contempt sanction for failing or refusing to comply with a court order which the court had no authority to render. *Musgrove v. U.S. Pipe and Foundry Co.*, 290 Ala. 156, 274 So. 2d 640 (1972); *Board of Revenue of Covington County v. Merrill*, 193, Ala. 521 68 So. 971 (1915).

Every person has an absolute right to be represented by attorneys of his own choosing. ALABAMA CONSTITUTION OF 1901, Art. I § 10; *See, Powell v. Alabama*, 287 U.S. 45 (1932); *State Realty Company v. Ligon*, 218 Ala. 541, 119 So. 672 (1921); *McKinley v. Campbell*, 217 Ala. 139, 115 So. 98 (1927); *Withers v. State*, 36 Ala. 256 (1860). Paragraph (g) of the April 30, 1975 decree violates this constitutional right and accordingly is void.

The right to be represented by counsel of one's own choice flows not only from the common laws of the various states but also from the due process clause of the United States constitution. In addition, the First Amendment to the United States

constitution guaranteeing freedom of speech, assembly and petition also guarantees any person the right to association with attorneys of his own choice. For this reason, in *United Mine Workers of America, District 12 v. The Illinois State Bar Association*, 389 U.S. 217, 88 S. Ct. 353 (1967), this Court held that the Illinois State Bar Association was precluded under the First Amendment to prohibit a union from hiring attorneys of its choice on a salary basis to assist the members in prosecuting workman's compensation claims. Any court order which prohibits a person from obtaining counsel of his choice is beyond that court's authority and is void. *Selvy v. Jacobucci*, 142 Colo. 53, 349, P.2d 567 (1960).

In the *Selvy* case, an attorney was employed by a juvenile to represent the juvenile in a delinquency proceeding. The parents of the juvenile filed a petition to prohibit the representation and the court entered an order precluding the attorney from representing the juvenile. The Colorado Supreme Court held that the juvenile had selected counsel of her own choosing, that the juvenile had an absolute right to a counsel of her own choosing, and that thus the court's order prohibiting the attorney from appearing and representing the client was beyond the court's jurisdiction and void.

Similarly, the Petitioner submits that the trial court exceeded its jurisdiction and authority by ordering the Petitioner to terminate for any purpose in any actions the enumerated attorneys. Such an order effectively denied the Petitioner the right to representation by attorneys of his own choice in other matters. Accordingly, the trial court's judgment of November 1, 1976, predicated upon Section (g) of the April 30, 1975 decree violated the Petitioner's First Amendment Right of

freedom of association and his Fourteenth Amendment right to due process of law.

CONCLUSION

The trial court's order of June 16, 1976 requiring the Petitioner to appear on July 19, 1976, and establish that he had complied with the conditions set forth in the trial court's order of April 30, 1975 for purging himself of contempt of court, failed to apprise the Petitioner of the charges to be filed and failed to notify the Petitioner that the issue of liability for monetary damages for failure to comply with said conditions would be litigated at the hearing on July 19, 1976. At a minimum, due process requires that an individual charged with the failure to comply with a Court's decree be given reasonable notice of the charges against him and a reasonable opportunity to appear and defend. In the proceedings below the Petitioner was unable to appear and attend and presented an affidavit from his personal physician attesting to the Petitioner's illness. The trial court, however denied the Petitioner's motion for a continuance and thereby deprived the Petitioner of an opportunity to appear and defend himself. Finally, it is clear that the decree of November 1, 1976, entered as a result of the July 19, 1976, hearing, and finding that had failed to purge himself from civil contempt by complying with all of the conditions set forth in the April 30, 1975 decree was a denial of due process, since the Petitioner established his attempt to comply, as well as his inability to comply with all of the conditions set forth therein.

For the reasons stated, Petitioner prays that his Petition for Certiorari to the Supreme Court of the State of Alabama be granted.

Respectfully submitted,

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PROOF OF SERVICE

Proof of Service of three copies of Petitioner's Petition for Writ of Certiorari to the Alabama Supreme Court upon each of the parties separately represented by counsel was filed by Frank G. Newman, a member of the Bar of the United States Supreme Court, with the Clerk of the United States Supreme Court on the same date the petitions were filed.

APPENDIX A

JANUARY 25, 1977

SC 2340

EX PARTE: SHEARN MOODY, JR., PETITIONER

PETITION FOR WRIT OF CERTIORARI

(IN RE: CIVIL CONTEMPT PROCEEDINGS ARISING OUT OF STATE OF ALABAMA, EX REL. BOOKOUT, ETC. V. EMPIRE LIFE INSURANCE COMPANY OF AMERICA, ETC.)

The petition for writ of certiorari to the Circuit Court of Jefferson County being duly submitted to this Court,

IT IS CONSIDERED AND ORDERED that the petition be, and the same is hereby, denied.

IT IS FURTHER ORDERED that costs be taxed against the petitioner, Shearn Moody, Jr., for which costs let execution issue.

Torbert, C. J., Maddox, Faulkner, Jones & Beatty, J. J., Concur.

APPENDIX B

February 22, 1977

THE STATE OF ALABAMA - - - JUDICIAL DEPARTMENT

IN THE

SUPREME COURT OF ALABAMA

OCTOBER TERM 1976-77

SC 2340

EX PARTE: SHEARN MOODY, JR., PETITIONER

PETITION FOR WRIT OF CERTIORARI

(IN RE: Civil Contempt Proceedings Arising out of: State of Alabama, ex rel. Bookout, etc. v. Empire Life Insurance Company of America, etc.)

ORDER

IT IS ORDERED that the application for rehearing filed by the petitioner in the above matter will not be considered by the Court, and said application for rehearing is being returned to petitioner.

APPENDIX C

IN THE

CIRCUIT COURT OF

JEFFERSON COUNTY, ALABAMA

IN EQUITY

STATE OF ALABAMA, EX REL.
JOHN G. BOOKOUT,
COMMISSIONER OF INSURANCE,
Plaintiff,
VS.
EMPIRE LIFE INSURANCE
COMPANY OF AMERICA, an
Alabama corporation,
Defendant,
and
SHEARN MOODY, JR.,
Intervenor.

CIVIL ACTION
NO. 171-687

MEMORANDUM BRIEF OF SHEARN MOODY, JR.

NOW COMES SHEARN MOODY, JR., an Intervenor in the above entitled and numbered cause and files this Memorandum Brief in compliance with the leave granted by this Honorable Court on July 19, 1976, at a hearing conducted on that date to determine whether Shearn Moody, Jr. had purged himself of contempt of this Honorable Court.

I,

STATEMENT OF FACTS WHICH OCCURRED ON JULY 19, 1976.

In November of 1974, a policyholder suit was filed in the U.S. District Court for the Middle District of Alabama, styled

Allmon v. John G. Bookout, who was then the Receiver for Empire Life Insurance Company of America. Thereafter, on January 6, 1975, this Honorable Court entered an Order which, among other things, enjoined Moody or his attorneys from prosecuting that action or filing any amended complaint therein. Thereafter, an amended complaint was filed in the Allmon suit and this Honorable Court entered an order, holding Moody and certain of his attorneys in contempt. That order was appealed and subsequently affirmed by the Alabama Supreme Court.

On April 30, 1975, the Order holding Moody in contempt was vacated. However, Moody was ordered to "purge himself of contempt" by taking certain actions specified in that Order, a copy of which is annexed.

Pursuant to that Order, Moody appeared before this Honorable Court on May 7, 1975, for questioning and he filed later with this Court a sworn statement, an affidavit of Scott Manley and copies of various telegrams and letters. Manley's attorneys are advised that following that appearance Mr. Tommy Lawson, who represented Mr. Moody at the hearing, was told by Mr. Drayton Nabers, Jr., attorney for Protective Life Insurance Company, that Moody need not fire his previous attorneys, if they would simply get out of the Allmon case.

Pursuant to the April 30, 1975 Order, Moody again appeared before this Honorable Court on May 12, 1975, and was directed to go to the office of the attorney for Protective Life Insurance Company and give his oral deposition, which he did.

Pursuant to the April 30, 1975 Order, Donald L. Collins, A Eric Johnston and the firm of Collins and Johnston, who had previously represented Moody, filed an affidavit herein.

The Order of April 30, 1975 stated that a hearing would be

held on May 19, 1975, to determine the extent and amount of damages sustained by any party by reason of any failure of Moody to comply with the Order of Injunction dated January 6, 1975. However, that hearing was postponed and has never been held.

On December 16, 1975, this Honorable Court signed an Order, stating that the appeal of the Allmon case had been vacated and the cause remanded to the U. S. District Court and that the Court was of the opinion that the Allmon case should proceed in the U.S. District Court to determine whether the case was moot, and that this Court was "committed to avoiding any interference with the Federal District Court's determination of the issue before said Court." The Order of December 16, 1975, "lifted" the injunction against Mr. Allmon and stated that no action would be taken to interfere with his full and active participation in the proceeding in that Court. Because of its significance, a copy of that Order is annexed hereto.

On June 16, 1976, this Honorable Court entered an Order that Moody appear in person before it on July 19, 1976, and then and there demonstrate that he had purged himself of contempt and fully complied with the Order dated April 30, 1975.

II.

STATEMENT OF FACTS WHICH OCCURRED ON JULY 19, 1976.

On July 19, 1976, Roy Cohn of the New York Bar was introduced to the Court by Drayton N. James, an attorney for Moody who is licensed to practice in this Honorable Court. Judge

Barber graciously permitted Mr. Cohn to appear on behalf of Mr. Moody. Mr. Cohn presented an affidavit from E. B. Vogelpohl, Jr., M.D. of Galveston, Texas, which certified that Mr. Moody was ill and unable to appear before this Honorable Court on July 19, 1976. Mr. Cohn respectfully moved orally for a continuance of the hearing to a date at which Mr. Moody was physically able to appear. The Court denied the Motion and ordered that the hearing proceed. The Court granted standing objections to all questions and evidence and standing exceptions.

Mr. Cohn offered certain telegrams and correspondence to show a good faith attempt of Moody to comply with the April 30, 1975 Order, but they were not admitted. The Court stated that it would consider Mr. Moody's deposition, which was taken on May 12, 1975, and anything else which had been filed in the Court. It is submitted that this would include Mr. Moody's affidavit, above-mentioned, the affidavit of Scott Manley, the affidavit of Messrs. Collins and Johnston and the telegrams and correspondence described in I. above.

Mr. Drayton Nabers, Jr., attorney for Protective Life Insurance Company, then proceeded to call Mr. Eric Johnston as his witness and introduced, over objection, Protective's exhibits 1 through 5A. Mr. Johnston's testimony concerned only facts which had occurred prior to April 30, 1975, and exhibits 1 through 5A concerned only matters which allegedly occurred prior to April 30, 1975.

Upon cross examination by Mr. Cohn, Mr. Johnston stated that he had no knowledge of any act done by Mr. Moody in violation of this Honorable Court's Order of April 30, 1975, and that every thing that he had been asked to testify about upon direct examination concerned matters which had occurred prior

to the April 30, 1975 Order. (Pages 65 and 66 of the Transcript.)

Mr. James W. Webb, attorney for the Receiver, then called Mr. Joel S. Dubina, a Montgomery attorney, as his witness. He testified that he had filed a lawsuit against Manley and Moody for a legal fee, arising from the fact that in April of 1975 Mr. Manley came to his office and asked his firm to represent him in an action entitled *Allmon v. Bookout*. He testified that Mr. Manley told him that Mr. Moody would take care of his fee. The Receiver offered in evidence a copy of the Complaint Mr. Dubina had filed, as Receiver's Exhibit 1.

On direct examination, the only work which Mr. Dubina stated that he had done in *Allmon v. Bookout* was to prepare an affidavit for Scott Manley, to be filed in the U. S. Fifth Circuit Court. He stated that he had no personal knowledge of whether it was ever sent to Mr. Manley (page 80 of the Transcript). Mr. Dubina identified, as Receiver's Exhibit no. 2, an affidavit he had filed in his firm's suit against Moody and Manley.

Upon cross examination by Mr. Cohn, Mr. Dubina stated that he had never met Mr. Moody and had never spoken to him, and that Moody by his own word and mouth had at no point retained him or anybody else in his firm to do anything in connection with the Allmon case (pages 84 and 85 of the Transcript). He also testified that Moody had moved to dismiss the suit against him for a legal fee by Mr. Dubina's firm.

After a brief recess, the Court excused Mr. Cohn, who found it necessary to leave for another engagement, but stated that Mr. Cohn had requested leave to file a brief in argument relative to the ruling of the Court. The Court stated that such leave was granted; the same to be filed within one week. The Court stated

that he did not want any further pleadings filed by anybody in this case relative to this contempt hearing, but that he would "accord anybody that wants to furnish the Court with briefs and memoranda based upon what has happened, and will happen up to the termination of this hearing today." (Page 89 of the Transcript.)

Mr. Nabers then introduced as Protective's Exhibit no. 6 the above mentioned affidavit of Moody, at which time the Court acknowledged that the above mentioned doctor's affidavit and the letter attached to same were marked and filed. (Page 90 of the Transcript.)

Mr. Nabers then introduced exhibits 7 and 8, which were affidavits of Messrs. Manley and Moody, which had been filed in a lawsuit by Collins and Johnston v. Moody for a legal fee and which pertain to actions taken by that law firm prior to April 30, 1975.

Mr. Nabers then introduced a deposition which had been taken of Mr. Allmon on January 16, 1975, more than 3 months prior to the April 30, 1975 Order. This was marked Exhibit 10. He then introduced as Exhibit 11 a deposition which had been taken of Mr. Allmon on March 25, 1976, at which Mr. Moody was neither present nor represented.

Mr. Nabers stated that he would later produce and offer as exhibits 12 and 13, transcripts of what had occurred at the hearings conducted by this Court on January 6, 1975 and March 10, 1975. The Court indicated that he could do so within the aforementioned one-week period.

Mr. Nabers then called Mr. William A. Robinson of his own law firm who identified Protective's exhibit 14 as a Motion of John S. Bleeker, Jr. for intervention in the Allmon suit in the

United States District Court. It was filed in February 1975, prior to the April 30, 1975 Order of this Honorable Court. He also identified exhibit 13 as an application for intervention of Mr. Bleeker, received by him in February 1975. Exhibits 14 and 15 are signed by Mr. Manley, as attorney for Mr. Bleeker. Mr. Robinson identified as exhibit 16 an Amendment to the Complaint in the Allmon case which he stated was filed in the last week of January 1975. He identified as exhibit 17 a Motion to Expedite Appeal of Allmon v. Bookout, filed in the U. S. District Court on May 5, 1975. He identified a Motion for Protective Order from the same Court on May 5, 1975, bearing the signatures of Scott Manley, Martin Paul Solomon and Eugene Gressman, which was marked as exhibit 18. Mr. Robinson next identified as exhibit 19 a Motion to Reinstate Appeal of John S. Bleeker in the Allmon case, filed by Edward Still, as his attorney, to which were attached Affidavits as to factual matters of Scott E. Manley, Martin Paul Solomon and Daryl Fanelli. He next identified as exhibit 20 an Affidavit of Scott Manley, filed in the United States Court for the Fifth Circuit in the Allmon case, dated November 12, 1975, in which, among other things, Mr. Manley stated that he had previously represented Mr. Allmon and Mr. Bleeker in that case. The affidavit was in response to information furnished the Clerk of that Court by a letter dated November 5, 1975 from James W. Webb and concerning Mr. Manley's past activities as an attorney for Mr. Bleeker in that case. Protective's exhibit 21 consisted of several affidavits received by Mr. Robinson in October of 1975 in opposition to a Motion he had filed to dismiss the Allmon Appeal in the Fifth Circuit Court. Exhibit 22 was identified as a letter from Mr. Manley to Judge Robert E. Varner, dated June 8, 1976 and

exhibit 23 was a letter to Judge Varner from Martin Paul Solomon dated June 7, 1976. Mr. Robinson then identified as exhibit 24 a Judgment signed by Judge Varner, dated June 28, 1976, dismissing the Allmon suit.

Mr. Robinson testified that Mr. Manley and Mr. Solomon appeared before Judge Varner at a hearing in December of 1975 and argued that the effect of Judge Barber's Injunction Order was to prevent their appearing as attorneys for Mr. Allmon because of their representation of Mr. Moody. (Page 125 of the Transcript.) Mr. Robinson testified that Mr. Solomon had represented Mr. Moody in the Alabama Supreme Court in an Appeal from the January 6, 1975 Injunction Order of this Honorable Court and that he had made a "conclusion" that Mr. Manley represented Mr. Moody after April 30, 1975. (Page 129 of the Transcript). Mr. Robinson also testified from cross examination that he had no knowledge of any financial support of Mr. Manley by Mr. Moody after the date of Mr. Moody's deposition (which was taken on May 12, 1975). (Page 131 of the Transcript.) Mr. Nabers became a witness and identified as exhibit 25 a letter from the Clerk of the United States District Court in the Allmon case, to the attorneys of record in that case, saying that Mr. Norman Reevie had requested a transcript. He identified as exhibit 26 a copy of a Summons and Complaint in a suit filed by Willie Allmon against Protective Life Insurance Company in Arkansas on January 26, 1976. That Complaint does not name at any place Mr. Moody or any of the above mentioned attorneys who may have represented Mr. Moody at any time.

III.

BRIEFS AND MEMORANDA BASED UPON WHAT HAS HAPPENED IN THE PAST.

After the hearing on July 19, 1976, and contrary to the Court's direction that no additional pleadings be filed herein, the Receiver, on July 20, 1976, filed an instrument entitled "Amendment to Petition for Damages" in which he requested that damages be assessed against Moody in the amount of one million dollars ($1,000,000); and in which he states that "on information and belief" Moody after April 30, 1975, continued to finance, assist and aid the Allmon suit by employment of the law firm of which Mr. Dubina is a member and by retaining and paying expenses of Scott Manley, Martin Paul Solomon and Edward Still.

Pursuant to the Court's statement that memoranda and briefs may be filed within one week from July 19, 1976 concerning "what has happened and what will happen to the termination of the hearing" the attorneys for Moody have filed with this Honorable Court the following:

1. This brief:
2. A certified copy of all documents filed in the United States District Court for the Fifth Circuit in the Allmon case after April 30, 1975.
3. A certified copy of all documents filed in the United States District Court for the Middle District of Alabama in the Allmon case after April 30, 1975.
4. The affidavit of Shearn Moody, Jr., pursuant to the April 30, 1975 Order, to which are attached an additional affidavit from Dr. Vogelpohl, giving more specific details as

to Mr. Moody's illness on July 19, 1976 and affidavits of Saxe, Bacon and Bolen and of Dale Major, as required by the April 30, 1975 Order, as well as copies of other documents predating the hearing on July 19, 1976, evidencing Moody's attempt to comply with the April 30, 1975 Order.

IV.

ARGUMENT AND AUTHORITIES

1. THE CASE SHOULD HAVE BEEN CONTINUED.

Mr. Roy Cohn came to Birmingham from New York at Moody's request and he advised the Court that he had represented Mr. Moody in a number of matters over a period of time and that he had been recently requested to represent him at this hearing and that he had come to Birmingham expressly and solely for the purpose of presenting the Affidavit of Mr. Moody's physician, which evidenced that he was ill and unable to appear before Court. No one would have been prejudiced by such contiunance and such a continuance would have made it possible for Moody to appear in person to present evidence of the most serious charge which has been made of him: contempt of this Honorable Court.

Instead, the hearing commenced and evidence was admitted of which Moody had no prior notice, including documents which represented that others had taken action in the Allmon case. The connection was alleged to be that they were at the same time Moody's agents. Surely, at this point in time, the hearing should have been continued until Moody was physically able

to bring in evidence, in the interest of a full and fair hearing and in the interest of justice. His attorneys at the hearing had not previously seen any of the pleadings or affidavits offered in evidence, which had been filed by others in the Fifth Circuit Court or the U. S. District Court in the Allmon case after April 30, 1975. The Court should have given them the opportunity for testimonial contradiction or explanation of such documents, which are urged by Protective and the Receiver to show contempt of this Honorable Court by Moody, even though none of those documents bear his name.

In connection with Moody's failure to appear, Moody would point out that when he was physically able to do so he has in fact, personally appeared before this Court. On May 7, 1975, he appeared before this Court and pursuant to this Court's command appeared again in Alabama on May 12, 1975, for an oral deposition. In connection with the hearing set by this Court on March 10, 1975, Moody, through his attorneys, indicated that he was too ill to appear at that hearing. It would be unreasonable, indeed, to hold that Moody has not purged himself of contempt and to hold him in further contempt of this Court since he has demonstrated that he was unable to comply with this Court's Order. See, *Natural Resources Defense Counsel, Inc. v. Train*, 510 F.2d 692 (D.C. Cir. 1974); *Brotherhood of Loc. Fire and Eng. v. Bangor & Aroostock, R. Co.*, 380 F.2d 570 (D.C. Cir. 1967) *cert. den.* 389 U.S. 327; *F.T.C. V. Blaine*, 308 F. Supp. 932 (N.D. Ga. 1970).

2. A CERTIFIED COPY OF THE PLEADINGS AND DOCUMENTS FILED IN THE FIFTH CIRCUIT AND THE U.S. DISTRICT COURT IN THE ALLMON CASE AFTER

APRIL 30, 1975, DO NOT SUPPORT THE ARGUMENT THAT MOODY HAS BEEN IN CONTEMPT OF THIS HONORABLE COURT.

It is true that on May 5, 1975, a few days after the April 30, 1975 Order of this Court, a Motion to Expedite Appeal and a Motion for Protective Order were filed in the Fifth Circuit Court and signed by Scott E. Manley and Martin Paul Solomon and Eugene Gressman. Neither Mr. Solomon nor Mr. Gressman is named in the April 30, 1975 Order of this Court. No showing was made that Mr. Manley even knew of the April 30, 1975 Order at the time the May 5, 1975 documents were filed in the Fifth Circuit Court. In addition, no showing was made as to when Mr. Moody learned of the April 30, 1975 Order and there is no recitation in that Order that anyone was present when the same was entered. This Honorable Court has previously acknowledged that Mr. Moody resides in Galveston, Texas.

A certified copy of the record of the Fifth Circuit shows that on July 21, 1975, Scott E. Manley, on behalf of himself and Jones, Murray, Stuart and Yarbrough (Mr. Dubina's firm), Martin Paul Solomon and Eugene Gressman filed a Motion for Leave to Withdraw as counsel in the Allmon case on account of the Order of this Court of April 30, 1975. The pleadings in the Fifth Circuit also show that such motion was granted and that Edward Still became attorney for the Appellants. Thereafter, the only documents filed in the Fifth Circuit signed by Mr. Manley or Mr. Solomon were affidavits, as witnesses to facts. In his affidavit of October 29, 1975, Mr. Manley stated that he had "previously appeared as an attorney of record in the aforesaid cause for Appellants Allmon and John S. Bleeker, Jr." The certified documents from the Fifth Circuit evidence that a question arose last fall as to whether the attorneys for the Appellants had diligently filed transcripts and paid the filing fees when the case was first brought up on appeal and prior to their withdrawal as attorneys for the Appellants. The affidavits of Scott Manley and Martin Paul Solomon were as witnesses in the case and in defense of the charges made against them by Protective and the Receiver that they had previously been negligent. However, it was Edward Still who continued as the attorney for the Appellants to the date that the case was remanded to the United States District Court.

In his affidavit which was attached to a Motion to Reinstate the Appeal in Fifth Circuit, which Motion was filed by Edward Still, Mr. Solomon stated that he had withdrawn from the Allmon case on April 24, 1975.

The certified copies of documents filed in the United States District Court for the Middle District of Alabama after April 30, 1975 in the Allmon case show clearly that Mr. Still was the attorney for the Plaintiffs, not Mr. Manley nor Mr. Solomon. The same papers show that on December 18, 1975, Mr. Still moved for a Protective Order in the United States District Court forbidding the Circuit Court for Jefferson County, Alabama, from taking any action to restrict the participation from attorneys retained by Mr. Allmon in that suit. The United States District Court denied that the Protective Order by an order in which that Court observed that "Judge Barber modified the Original Injunction by entering an Order on December 16, 1975, which stated that no action will be taken to interfere with Willie Allmon's active and full participation in the proceedings on the mootness question."

It is interesting to note that from the pleadings filed in the

United States District Court Protective Life Insurance Company filed an "Answer to Motion for Protective Order" on December 30, 1975, in which it is stated that the attorneys for Bookout and Payne presented a proposed order to Judge Barber which had been orally approved by him, which would entitle Mr. Allmon to proceed in the U.S. District Court with any attorneys of his choice.

The fact that Mr. Manley and Mr. Solomon each wrote a letter to Judge Varner in June of 1975 (Protective's exhibits 22 and 23) is of no significance. On May 31, 1976, Mr. Nabers and Mr. Robinson as attorneys for Protective Life Insurance Company, sent a letter to Judge Varner, submitting proposed Findings of Fact and Conclusions of Law. A copy of that letter and a proposed Findings of Fact and Conclusions of Law were sent to Scott Manley and a copy was sent to Mr. Paul Solomon, as well as Mr. Edward Still and others. Protective thus invited their comments which were sent by Mr. Solomon's letter and Mr. Manley's letter to the Judge. Mr. Solomon stated in the first paragraph of his letter that he had appeared as counsel for Mr. Allmon until he was forced to withdraw when the case was pending in the Fifth Circuit. In Mr. Manley's letter to Judge Varner, again in response to the letter of May 31, 1976 from Mr. Nabers and Mr. Robinson, Mr. Manley makes it clear that he had represented Mr. Bleeker, and Intervenor whose appeal had been dismissed by the Fifth Circuit Court on June 24, 1975.

The record after April 30, 1976 in the Fifth Circuit and in the U. S. District Court in the Allmon case is clear that soon after they learned of this Honorable Court's Order of April 30, 1975, both Mr. Manley and Mr. Solomon withdrew from the

case and Mr. Still became the only attorney for the Appellants-Plaintiffs.

There was no evidence that Mr. Moody ever paid Mr. Still or had anything to do with his employment. Nor is there anything in the record to show that Mr. Moody compensated Mr. Manley or Mr. Solomon after April 30, 1975, for any services in connection with the Allmon case.

3. MOODY HAS A CONSTITUTIONAL RIGHT TO RETAIN COUNSEL OF HIS CHOICE. THUS, THIS COURT EXCEEDED ITS AUTHORITY IN ORDERING MOODY TO TERMINATE ALL REPRESENTATION BY CERTAIN DESIGNATED ATTORNEYS.

The April 30, 1975 Order provided that Moody could purge himself of contempt by, among other things, terminating immediately all employment of certain attorneys designated in such Order. Although no evidence was introduced to show that Moody failed to do this, Moody submits that the Order is overbroad in that it requires as a condition to Moody's purging himself that he terminate further representation by the designated attorneys in cases other than *Allmon v. Bookout*, the subject matter of the contempt order. Moody submits that under the Constitution of the United States and under the laws of Alabama, he has a right to be represented in cases other than Allmon by attorneys of his own choosing. Accordingly, Moody submits that this Court exceeded its authority in ordering Moody to terminate all employment whatsoever with respect to certain attorneys enumerated in this Court's Order, and that such an Order cannot and should not be a condition of the purging of contempt.

It cannot be disputed that every person has an absolute right to be represented by attorneys of his own choosing. *Swartz v.*

Swartz, 76 S.W.2d (1971 Tex.Civ.App. — Dallas, 1934); *Roberts v. Anderson*, 66 F.2d 874 (10th Cir. 1933); *United States v. Certain Parcels of Land in Price George County, Maryland*, 40 F. Supp. 436 (D.Md. 1941); *Arnold v. Ft. Worth & D.S.R. Railway Company*, 8 S.W.2d (298 Tex.Civ.App. — Amarillo, 1948); *Universal Athletics Sales Company v. American Gym, Recreational and Athletic Equipment Corporation, Inc.*, 357 Supp. 905 (W.D.Pa. 1973).

This right to be represented by counsel of one's own choosing flows not only from the common laws of the various states but also from the Due Process Clause of the United States Constitution. In addition, the First Amendment to the United States Constitution guaranteeing freedom of speech, assembly, and petition also guarantees any person the right to association with attorneys of his choosing. For this reason, in *United Mine Workers of America, District 12 v. The Illinois State Bar Association*, 389 U.S. 217, 88 S.Ct. 353, 19 L.Ed.2d 426 (1967), U.S. Supreme Court held that the Illinois State Bar Association was precluded under the First Amendment to prohibit a union from hiring attorneys of its choice on a salary basis to assist the members in prosecuting workmen compensation claims. Any court order which prohibits a person from obtaining counsel of his choice is beyond that court's authority and is void. *Selvy v. Jacobucci*, 142 Colo. 53, 349 P.2d (567, 1960).

In the *Selby case*, an attorney was employed by a juvenile to represent the juvenile in a delinquency proceeding. The parents of the juvenile filed a petition to prohibit the representation and the court entered an order precluding the attorney from representing the juvenile. The Colorado Supreme Court held that the juvenile had selected counsel of her own choosing, that the

juvenile had an absolute right to a counsel of her own choosing, and that thus the court's order prohibiting the attorney from appearing and representing this client was beyond the court's jurisdiction and void.

Similarly, Moody submits this Court exceeded its jurisdiction and authority by ordering Moody to terminate for any purpose in any actions the enumerated attorneys. Such an order effectively denies Moody the right to representation by attorneys of his own choosing. For the reasons stated above, this Court should not and can not ask Moody to take such action and then find that Moody has not purged himself if he does not do so.

4. MOODY HAS SUBSTANTIALLY COMPLIED WITH THE APRIL 30, 1975 ORDER AND NO SHOWING HAS BEEN MADE OF ANY FAILURE TO DO SO.

The April 30, 1975 Order expressly stated in the last paragraph that the Court's Order of March 10, 1975 finding Moody in Civil Contempt of the January 6, 1975 Injunction was vacated.

However, in Section 2 of the Order, Moody was directed to do all the things specified in (a) through (j). There has been absolutely no showing that Moody has failed to do anything except appear before this Honorable Court on July 19, 1976. However, for reasons stated above, a clear showing was made at that time that Moody was physically unable to so appear and certainly this Honorable Court would not direct anyone to take an action which would seriously endanger his health.

Moody was required by the April 30, 1975 Order to file sworn statements as to fees paid by him to certain attorneys and a sworn statement concerning meetings and conferences he had attended concerning the Allmon case. That affidavit was filed in this Honorable Court and clearly did just that. It is believed that

such affidavit was transmitted to Judge Barber by a letter dated July 25, 1975, which was longer than the ten-day period specified in the April 30, 1975 Order, but no objection to that delay has heretofore been made by anyone.

The same letter from Moody to Judge Barber included telegrams, evidencing clearly a good faith attempt by Moody to comply with the April 30, 1975 Order. One was a telegram from Dale R. Major, stating that he had withdrawn from the Allmon case which was dated May 12, 1975. Another was a telegram from Eugene Gressman dated May 11, 1975, stating that he had withdrawn all connections and representations in the Allmon case. Another was a telegram to Moody from Collins & Johnston, dated May 9, 1975, stating that they were preparing the accounting for the legal fees and expenses as required by the Court's Order. The same was subsequently filed in affidavit form in this Court. Another such telegram was dated May 12, 1975, from Scott Manley stating that he had withdrawn from the Allmon case and that he was preparing formal papers and that he had discharged local counsel who were similarly withdrawing. As stated above, the Motion for Leave to Withdraw was subsequently filed and granted. Another such telegram was from Dale R. Major dated May 9, 1975, in which he stated that he would furnish the itemization and detail of fees paid him and disbursements made by him. Another was a letter from Manley to Moody dated May 8, 1975, stating that he would furnish the detail on fees and expenditures, as required by the April 30, 1975 Order. Another is a letter from Moody to Saxe, Bacon, Bolen and Manley dated May 9, 1975, requesting the aforementioned fee information.

Moody was requested by the April 30, 1975 Order to require

such fee information and the record is clear that he did so. The Collins and Johnston affidavit was filed last year and it is understood that the Scott Manley affidavit was filed last year. At the hearing on July 19, 1976, Moody's attorneys offered in evidence a letter from Roy Cohn to Moody stating that no amount had been paid Saxe, Bacon & Bolen by Moody in connection with the Allmon case. This was not admitted, although Cohn was present at the time.

Admittedly, although Moody was ordered to require such sworn statements from such attorneys, they have not heretofore been furnished by Saxe, Bacon and Bolen, nor by Dale R. Majo This is true because they were simply not received by Moody although they were requested. They are now attached to an affidavit filed herewith and on this date by Shearn Moody, Jr. pursuant to the Court's Order of April 30, 1975.

In compliance with the Court's Order of April 30, 1975, Moody appeared before the Court on May 7, 1975 and on May 12, 1975 and on the last mentioned dates submitted to an oral deposition by Order of the Court.

How, then, can it be seriously contended that Moody has failed to purge himself of contempt of this Court? It simply cannot. The only evidence offered by Protective or the Receiver concerned: (a) actions prior to April 30, 1975, and (b) actions by only Manley and Solomon after April 30, 1975. The evidence concerning their actions was presented in a completely distorted fashion by taking only parts of the records before the Fifth Circuit Court and the U. S. District Court of the Middle District of Alabama and presenting them out of context. Furthermore, of all the pleadings and orders entered in such courts after April 30, 1975, certified copies of which have been filed in this

Court herewith, it is clear that Manley and Solomon withdrew from the Allmon case; that they were required to defend their prior actions concerning the transcript and filing fee and did so by mere affidavits as witnesses. Surely this Court did not direct that Moody's attorneys or ex-attorneys never appear as witnesses in an Allmon or Allmon-related case.

After they withdrew from the Allmon case, while it was pending in the Fifth Circuit Court, the case was remanded to Judge Varner and they appeared before him and said they were unable to represent Mr. Allmon, because of the April 30, 1975 Order. The documents from that court reflect that in December 1975 there was some consternation as to who, if anyone, should represent Mr. Allmon and, indeed, whether Mr. Allmon could be a party to the suit, in view of the prior orders of this Honorable Court. This was solved by this Honorable Court's Order of December 16, 1975 which is annexed. It clearly sanctioned the continuation of the case by Mr. Allmon, and presumably by attorneys of his choice. (How else could he proceed?) However, even thereafter Manley and Solomon refused to renew or take up their representation of Allmon. When Protective mailed copies of the proposed Findings of the Facts and Conclusions of Law to both Manley and Solomon, by its attorneys' letter of May 31, 1976, it invited their comments to Judge Varner which were submitted in the clear capacity as former attorneys, who had withdrawn from the case. How can Protective now complain of an act it requested?

No showing has been made that Moody knew anything whatsoever about what was going on in the Allmon case after April 30, 1975, except for those facts stated in his own Deposition and Affidavit, aforementioned. No showing was made that

Manley represented Moody after the date of Moody's Deposition and Affidavit. The only showing of representation by Moody of Solomon was before the Alabama Supreme Court in the appeal of the January 6, 1975 Order.

5. MOODY HAS THE RIGHT TO A JURY TRIAL.

The April 30, 1975 Order provided that a hearing would be had to determine the compensatory damages to be paid by Moody to Protective and the Receiver. That hearing was not then held and has not been held. Whenever it is held Moody has a right to a jury trial on the issue of the existence and the amount of compensatory damages, if any. This is clearly established by the Alabama Supreme Court in *Lightsey v. Kensington Mortgage and Finance Corporation*, 315 So.2d 431 (Ala. 1975). As the Alabama Supreme Court indicated at 436-7:

> We know of no statute or decision of this court that nas ever authorized a circuit court to impose a fine as indemnity or as compensatory damages to the adverse party in the civil action. We think the question of the amount of unliquidated damages should be regularly tried so that the dissatisfied party could have an initial review by an appeal rather than by a writ of certiorari. An indemnity or a compensatory award of damages must be determined in an ancillary proceeding and is not permissible as an integral part of the court's adjudication of contempt in the circuit courts of this state.
>
> * * *
>
> . . . we believe either party on demand would be entitled to a jury trial on the issue of damages. We perceive of no reason why this cannot be afforded in the same proceeding on petition of the aggrieved party seeking damages after the finding by the trial court that the opposite party is in contempt. A jury would be impaneled to hear the evidence on such petition and determine whether damages, compensatory or punitive, should, under the usual rules, be imposed.

Accordingly, before Moody will be able to purge himself of contempt by satisfying the condition (i) set forth in the order of April 30, 1975, Moody demands and insists that a jury trial be had upon the issue of the damages allegedly suffered by Protective and the Receiver as a result of his alleged contempt.

CONCLUSION

Moody has shown a good faith effort to comply with the April 30, 1975 Order of this Court. There has been no showing that he has failed to purge himself of contempt and the Order of Contempt itself was vacated.

Although the December 16, 1975 Order of this Court made it clear that this Court was committed to not interfere with U. S. District Court's handling of the Allmon case and that Allmon could proceed in that action, Manley and Solomon continued to refrain from representing Allmon.

There is not one shread of evidence that Moody has had anything to do with the Allmon case after April 30, 1975. The only thing he has failed to do was to appear before this Honorable Court on July 19, 1976, for the reason that to do so would seriously endanger his health, as clearly shown by the affidavit of Dr. Vogelpohl stating that he had seen Moody since March 2, 1976; that he has had a severe hypertension, at one time classified as malignant; that he had hypertension on July 15, 1976 and allergic rhinosinusitis, acute gastroenteritis, and acute viral infection, and acute pharyngitis and acute tonsilitis! If this is not a reasonable excuse for his absence, then, indeed, it is believed that no reasonable excuse could ever be supplied for the failure of a party to appear before a Court.

Moody respectfully prays that this Honorable Court not find

him in contempt. He has not intentionally violated the April 30, 1975 Order and has done all that any reasonable person could do to comply with it.

Respectfully submitted,

Roy Cohn of
SAXE, BACON & BOLEN
39 East 68th Street
New York, New York

/s/ FRANK G. NEWMAN
Frank G. Newman
NEWMAN, SHOOK & NEWMAN
4330 Republic Bank Tower
Dallas, Texas 75201

/s/ DRAYTON JAMES
Drayton James
Attorney at Law
Frank Nelson Building, Suite 817
Birmingham, Alabama

I certify that a copy of the foregoing Brief and the affidavit of Shearn Moody, Jr. described therein were mailed to Drayton Nabers, Jr. and James Webb this 26th day of July, 1976.

/s/ DRAYTON JAMES
Drayton James

APPENDIX D

IN THE SUPREME COURT OF ALABAMA

CASE NO._____

EX PARTE SHEARN MOODY, JR.,
Petitioner,

IN RE: Civil contempt proceeding
arising out of:

STATE OF ALABAMA, EX REL.
JOHN G. BOOKOUT, COMMISSIONER
OF INSURANCE
Plaintiff,

vs.

EMPIRE LIFE INSURANCE COMPANY
OF AMERICA, AN ALABAMA
CORPORATION,
Defendant.

Circuit Court Case Number 171-687,
Circuit Court of Jefferson County, Alabama

PETITION FOR WRIT OF CERTIORARI

CLARK & JAMES
817 Brank Nelson Building
Birmingham, Alabama 35203
NEWMAN, SHOOK & NEWMAN
4330 Republic National Bank Tower
Dallas, Texas 75201
ROGERS, HOWARD, REDDEN & MILLS
1033 Frank Nelson Building
Birmingham, Alabama 35203
Attorneys for Petitioner

TO THE SUPREME COURT OF ALABAMA:

Comes now the Petitioner, Shearn Moody, Jr., and petitions the Court for a writ of certiorari to the Circuit Court for Jefferson County, Alabama, and in support of his petition respectfully represents and shows unto the Court as follows:

Purpose and Grounds for Petition

1. This petition for a writ of certiorari is filed as an alternative means of reviewing an "Order and Decree" rendered by the Circuit Court of Jefferson County, Alabama, on November 1, 1976. A copy of the said "Order and Decree" is attached as Exhibit 1 to this petition. The Petitioner has filed notice of appeal to the Supreme Court of Alabama from the said "Order and Decree". If it be determined that appeal is not in the proper procedure for reviewing the said judgment this petition for writ of certiorari is filed as an alternative.

Parties

2. Petitioner is over the age of 21 years and is a resident citizen of the State of Texas.

3. Protective Life Insurance Company is a corporation organized and existing under the laws of the State of Alabama.

4. The Honorable William C. Barber is a Judge of the Circuit Court of Jefferson County, Alabama, and was the judge who presided over the proceedings hereinafter described and was the judge who rendered the judgment which this petition seeks to review.

5. Charles H. Payne, the Commissioner of Insurance of the State of Alabama, is Receiver of Empire Life Insurance Company of America by appointment of the Circuit Court of Jeffer-

son County, Alabama, in a case designated as Case Number 171-687 and styled "State of Alabama, ex rel Charles H. Payne, Commissioner of Insurance, Plaintiff vs. Empire Life Insurance Company of America, Defendant."

Statement of Facts

6. On June 16, 1976, the Circuit Court of Jefferson County, Alabama, the Honorable William C. Barber, Circuit Judge, presiding, entered an order *ex mero motu* directing the Petitioner to appear before that Court on July 19, 1976, and demonstrate whether or not he had purged himself of civil contempt of that court and had fully complied with an order of that court entered on April 30, 1975. A copy of the said order dated June 16, 1976, is attached hereto as Exhibit 2 to this petition. A copy of the said order entered on April 30, 1975, is attached hereto as Exhibit 3 to this petition.

7. A hearing was held before the said court on July 19, 1976. Following this hearing, and on November 1, 1976, the trial court entered a judgment styled "Order and Decree", a copy of which is attached hereto as Exhibit 1 to this petition.

8. At the time of the said hearing on July 19, 1976, the action referred to in the said "Order and Decree" of November 1, 1976, as the "Allmon" case had been finally terminated.

9. At the time of the said hearing on July 19, 1976, the receivership proceeding designated as Civil Action Number 171-687 in the Circuit Court of Jefferson County, Alabama which is referred to in the "Order and Decree" of November 1, 1976, had been terminated and the reinsurance agreement, which is also referred to in the said "Order and Decree," had been consummated.

Issues Presented for Review

10. The issues presented for review by this petition are as follows:

(a) Whether a civil contempt proceeding may be maintained after the orders and decrees which it purports to enforce or aid in enforcing have been fully executed.

(b) Whether a party adjudged guilty of civil contempt can be ordered to pay all costs and expenses incurred by reason of the investigation, preparation for, and conduct of civil contempt proceedings against him.

(c) Whether a party adjudged guilty of civil contempt can be ordered to pay attorneys' fees incurred by the parties bringing the contempt action against him.

(d) Whether a party adjudged guilty of civil contempt can be required to pay all costs, damages, and expenses incurred by other parties to the action as a result of his failure to purge himself of civil contempt.

(e) Whether or not the evidence supports the findings and orders of the said "Order and Decree" dated November 1, 1976.

Relief Sought

11. The relief sought by this petition is as follows:

(a) An order vacating and setting aside the judgment entitled "Order and Decree" dated November 1, 1976.

(b) An order rendering judgment in favor of the Petitioner on the matters described in the said "Order and Decree" dated November 1, 1976, and terminating further civil contempt proceedings against the Petitioner arising out of the said receivership proceeding designated as Civil Action Number 171-687 in the Circuit Court of Jefferson County.

(c) Such other relief as may be appropriate in the premises.

WHEREFORE, THE PREMISES CONSIDERED, the Petitioner prays that the Court will grant this petition for a writ of certiorari, that Protective Life Insurance Company and the Honorable William C. Barber, Circuit Judge, be made respondents to this proceeding, that the Register of the Circuit Court of Jefferson County, Alabama, be directed and required to prepare and transmit to this Court a full and complete record or transcript of all proceedings therein, including a court reporter's transcript of all evidence and proceedings, including pre-trial hearings on motions, duly certified, so that this Court may review the said cause. And Petitioner prays that pending a determination by this Court of this matter that this Court will make and enter an order suspending the execution of the said judgment of the Circuit Court of Jefferson County, Alabama, until this Court decides the issues presented by this petition. And Petitioner prays for such other, further, different, or general relief as he may be entitled to in the premises.

CLARK & JAMES
817 Frank Nelson Building
Birmingham, Alabama 35203

NEWMAN, SHOOK & NEWMAN
4330 Republic National Bank Tower
Dallas, Texas 75201

ROGERS, HOWARD, REDDEN & MILLS
1033 Frank Nelson Building
Birmingham, Alabama 35203
/s/ WILLIAM H. MILLS
Attorneys for Petitioner

STATE OF ALABAMA }
JEFFERSON COUNTY }

Before me, the undersigned authority in and for said County in said State, personally appeared William H. Mills, who is known to me, and who by me being first duly sworn deposes and says that he is one of the attorneys for the Petitioner in this cause, that he has read the averments of the foregoing petition and that the averments of fact stated therein are true and correct to the best of his knowledge, information, and belief.

/s/ WILLIAM H. MILLS
William H. Mills

Sworn to and subscribed before me, this 23rd day of November, 1976.

/s/ PAULA K. SAMPLE
Notary Public

CERTIFICATE OF SERVICE

I certify that I have served a copy of the foregoing Petition for Writ of Certiorari upon the Honorable William C. Barber, Circuit Judge, upon Cabaniss, Johnston, Gardner, Dumas & O'Neal, counsel for Protective Life Insurance Company, and upon James Webb, counsel for Charles H. Payne, Commissioner of Insurance of the State of Alabama, as Receiver of Empire Life Insurance Company of America, by mailing a copy of the same to each of them, properly addressed and with sufficient postage prepaid, this 23rd day of November 1976.

/s/ WILLIAM H. MILLS
Of Counsel for Petitioner

EXHIBIT I

IN THE
CIRCUIT COURT OF JEFFERSON COUNTY
EQUITY DIVISION

STATE OF ALABAMA, Ex Rel.
JOHN G. BOOKOUT,
COMMISSIONER OF INSURANCE,
Plaintiff,
vs.
EMPIRE LIFE INSURANCE COMPANY
OF AMERICA, an Alabama
corporation,
Defendant,
and
SHEARN MOODY, JR.,
Intervenor.

CIVIL ACTION
NO. 171-687

ORDER AND DECREE

This cause came before the Court for evidentiary hearing on July 19, 1976 pursuant to order of the Court entered June 16, 1976. Having carefully considered the documentary evidence adduced at said hearing, oral testimony of witnesses, and argument of counsel, the Court is of the opinion that the following findings, conclusions, order and decree are due to be and hereby are entered in this cause.

1. By Order entered June 16, 1976, this Court ordered Shearn Moody, Jr., a party to this action, to appear before the Court on July 19, 1976, and then and there demonstrate to the Court that he had purged himself of civil contempt of this Court

and had fully complied with the Order of this Court entered on April 30, 1975, which Order adjudicated Moody in civil contempt based on uncontested evidence, *inter alia*, that

(a) Moody knowingly and willfully disobeyed and ignored the provisions of an Injunction entered by this Court on January 6, 1975 by sponsoring, aiding, and controlling the filing of an amended complaint in a lawsuit entitled *Willie Allmon, etc. v. John G. Bookout, et al.*, Civil Action No. 74-377-N (U.S. District Court for the Middle District of Alabama), without seeking or obtaining leave of this Court to do so as required by said Injunction.

(b) The filing and prosecution of the *Allmon* case directly and adversely affected the affairs of Empire Life Insurance Company of America ("Empire"), its receivership, its Receiver, and the implementation of the orders and decrees of this Court.

2. On July 19, 1976, at the time and place specified, Moody failed to appear. Three of Moody's attorneys were present, however, and sought to explain Moody's failure to attend. The explanations offered were wholly insufficient to explain Moody's failure to appear. Moody made no effort prior to the July 19, 1976 hearing to seek a continuance, though one of his attorneys did request, during the course of the hearing, the opportunity to present some testimony that he might find appropriate at some later date. The Court denied such request. Moody had ample opportunity prior to said hearing to arrange for the attendance of any witnesses whose testimony he desired and to procure and develop any other evidence he intended to offer. Moody was represented by three attorneys, two of whom, Messrs. Newman and James, this Court knows to be fully knowledgeable concerning all developments in this proceeding.

3. No substantative evidence was offered on behalf of Moody to demonstrate that he had complied with the April 30, 1975 Order or that he had otherwise purged himself of civil contempt of this Court.

4. Having carefully considered voluminous documentary evidence, the testimony of witnesses, and argument of counsel, the Court is of the opinion that there exists clear and convincing, undisputed evidence that

(a) Moody, by and through his attorneys and agents, in flagrant violation of this Court's Orders of January 6, 1975 and April 30, 1975 continued to aid, assist, support and control the prosecution and maintenance of the *Allmon* litigation up until June 1976, at which time said action was ultimately dismissed by the federal district court as moot.

(b) The *Allmon* complaint was prepared by one of Moody's attorneys of record in this case with the active assistance of Moody himself; his house counsel (Scott E. Manley); his administrative assistant (Norman Revie); and a law clerk for Moody's house counsel (Darryl L. J. Fanelli).

(c) The *Allmon* complaint, as amended, was filed by Darryl Fanelli, law clerk to Moody's house counsel, whose legal education is being financed by Moody and his house counsel. The cost of serving the *Allmon* complaint, as amended, was billed to Moody. Alabama attorneys were hired by Moody to handle Empire-related litigation for him in Alabama, including the *Allmon* case, at a retainer of $1500.00 per week.

(d) Moody signed an indemnity agreement purporting to hold certain of his Alabama attorneys harmless from any liability based on violation of the Order and Injunction entered

herein on January 6, 1975, which prohibited, *inter alia*, the filing of the amended complaint in *Allmon* without prior approval of this Court.

(e) In April 1975 Moody's house counsel employed Montgomery attorneys to represent Moody in continuing prosecution of the *Allmon* case. Moody's counsel represented that Moody would take care of all attorneys' fees incurred. The Montgomery attorneys thus employed on behalf of Moody continued to prosecute the *Allmon* action on behalf of Moody after April 1975.

(f) After issuance of the April 30, 1975 Order, Moody's house counsel and other Moody attorneys sought federal court review of said Order by the Fifth Circuit Court of Appeals, in connection with the appeal from the district court's entry of summary judgment in the *Allmon* action. Moody's attorneys also sought injunctive relief from the federal appeals court enjoining implementation of the Order entered by this Court on April 10, 1975. The pleadings and papers filed by Moody's house counsel and other Moody lawyers in connection with the *Allmon* appeal further acknowledged that Moody had employed attorneys to prosecute the *Allmon* action and that the attorneys so employed were due to be discharged under the terms of the April 30, 1975 Order of this Court.

(g) Numerous affidavits executed by Moody's house counsel and other Moody agents in opposition to dismissal of the *Allmon* appeal demonstrate Moody's pervasive control of the *Allmon* appeal and attempts to prevent its dismissal.

(h) Pleadings and affidavits filed in an action brought in federal district court here in Birmingham* by attorneys who had

previously represented Moody in these proceedings and in the *Allmon* action bear further witness to Moody's pervasive control of the *Allmon* action. The Court refers specifically to affidavits filed in said action by Moody, Manley, and one of Moody's ex-counsel who testified at the hearing on July 19, 1976.

(i) Moody's counsel, Manley, and Martin Solomon, a New York lawyer representing Moody, continued active involvement in the *Allmon* action after it was remanded to the federal district court in Montgomery until well after the hearing in May 1976, on the basis of which the Allmon action was dismissed as moot.

(j) Moody's activities and those of his agents described above, are exacerbated by the fact that the federal district court ultimately determined that Willie Allmon had not been injured or damaged in any way by the reinsurance agreement that was submitted by Protective Life Insurance Company ("Protective") and approved by this Court. It was, of course, the reinsurance agreement and the approval of the same by this Court, that Moody utilized as the ostensible factual basis for the *Allmon* litigation.

(k) Moody's activities and those of his agents described above are further exacerbated by the fact that the federal district court ultimately determined that Willie Allmon had intentionally and voluntarily terminated his status as an Empire policyholder during the pendency of the appeal of the *Allmon* action to the Fifth Circuit Court of Appeals. It was Allmon's status as policyholder, of course, that provided the sole basis for maintenance

**Donald L. Collins, et al., etc. v. Shearn Moody, Jr.*, Civil Action No. 75-L-0484S (United States District Court for the Northern District of Alabama).

of the *Allmon* appeal by Moody's lawyers ostensibly in Allmon's name. The opposition by Moody's lawyers to dismissal of the *Allmon* appeal, moreover, was premised on allegations made by them and other Moody's agents that the termination of Willie Allmon's status as policyholder had been engineered by Protective and was neither voluntary nor intentional. The findings and conclusions of the federal district court on remand conclusively establish those allegations to have been totally without merit.

ACCORDINGLY, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

ONE: Shearn Moody, Jr. has failed to purge himself of civil contempt of this Court.

TWO: Shearn Moody, Jr., has failed to comply with the Order of this Court entered April 30, 1975. Moody specifically failed, *inter alia*, to take the actions required by paragraphs (c), (e), (g), (h) and (j) as set forth on page 7 *et seq.* of said Order.

THREE: Shearn Moody, Jr. is hereby ordered to pay to Protective Life Insurance Company and the Receiver any and all costs, damages, expenses incurred by them as a result of Moody's failure to purge himself of civil contempt, including, but not limited to, those incurred by reason of the appeal in the *Allmon* action and the proceedings on remand in that action. As regards Protective, determination of the amount of such damages, etc., shall be made at the hearing presently scheduled for determination of the amount of the default judgment entered against Moody and in favor of Protective in the ancillary proceedings. As regards the Receiver, determination of the amount of such damages, etc., shall be made at the time of the hearing on the

Receiver's petition for damages against Shearn Moody, Jr. in the ancillary proceedings.

FOUR: Protective is entitled to recover and Moody is hereby ordered to pay all costs and expenses incurred by reason of the investigation, preparation for, and conduct of the civil contempt proceedings, including, but not limited to, the proceedings herein on July 19, 1976. Protective's counsel is further entitled to recover and Moody is hereby ordered to pay reasonable attorneys' fees attributable to the civil contempt proceedings. The amount of such costs, expenses, and attorneys' fees to be awarded shall be determined by the Court at the hearing presently scheduled for determination of the amount of the default judgment.

FIVE: Shearn Moody, Jr. is hereby ordered to comply with any further orders, decrees, and judgments of this Court relating to this matter.

DONE this 1st day of November, 1976.

/s/ WM. C. BARBER
Circuit Judge

EXHIBIT 2

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA IN EQUITY

STATE OF ALABAMA, Ex. Rel.
JOHN G. BOOKOUT,
COMMISSIONER OF INSURANCE,
Plaintiff,

vs.

EMPIRE LIFE INSURANCE
COMPANY OF AMERICA, an
Alabama corporation,
Defendant,

and

SHEARN MOODY, JR.
Intervenor.

CIVIL ACTION
NO. 171-687

ORDER

Pursuant to the terms of that certain Order of this Court dated April 30, 1975, adjudging Shearn Moody, Jr. to be in civil contempt, the Court does hereby *ex mero motu* order and command Shearn Moody, Jr. to appear in person before this Court on July 19, 1976, at 1:30 o'clock p.m., in Room 223, Jefferson County Courthouse, 710 North 21st Street in the City of Birmingham, Alabama, and then and there demonstrate to the Court that the said Shearn Moody, Jr. has purged himself of contempt of this Court and has fully complied with the Order of this Court dated April 30, 1975.

All parties to the above cause are hereby granted leave to adduce such evidence as may be deemed necessary in connection with the hearing hereby scheduled in the above cause on July 19, 1976.

If the services of a court reporter are desired, please make your arrangements in advance.

DONE this 16th day of June, 1976.

/s/ WM. C. BARBER
Circuit Judge in Equity Sitting

EXHIBIT 3

IN THE CIRCUIT COURT FOR THE TENTH JUDICIAL CIRCUIT OF ALABAMA EQUITY DIVISION

STATE OF ALABAMA, Ex. Rel.
JOHN G. BOOKOUT,
COMMISSIONER OF INSURANCE,
Plaintiff,

vs.

EMPIRE LIFE INSURANCE
COMPANY OF AMERICA, an
Alabama corporation,
Defendant,

and

SHEARN MOODY, JR.
Intervenor.

CIVIL ACTION
NO. 171-687

ORDER

This Court is in receipt of an order issued by the Supreme Court of Alabama, addressed to the undersigned, as Judge of the Tenth Judicial Circuit of Alabama on April 23, 1975, directing the undersigned to show cause why the undersigned should not specify in some detail what is required of Shearn Moody, Jr. to purge himself of contempt of court. As a result of said show cause order, this Court enters the following findings, conclusions, order and decree:

1. On January 6, 1975, the undersigned, as Judge of the Tenth Judicial Circuit of Alabama, issued an injunction in this

cause, which injunction this Court is expressly authorized to issue by Alabama statute. Title 28A, § 624 *Code of Alabama* 1940, as amended, provides that the Court in a receivership proceeding for an insurance company may, if deemed necessary by the Court, issue injunctions to prevent interference with the receiver, or the receivership proceedings, or the receivership assets. The statute also expressly authorizes the receivership Court to enjoin the commencement or prosecution of legal actions.

2. The injunction issued by this Court on January 6, 1975, enjoined Shearn Moody, Jr. (his officers, agents, servants, employees and attorneys) and others, from filing any lawsuit, complaint or legal claim, or any amendment to a complaint or legal claim, which lawsuit, claim or amendment relates to the receivership of Empire Life Insurance Company of America ("Empire") or the implementation of any order or decree of this Court in connection with said receivership, without the prior approval of this Court.

3. At all times material to this action, Shearn Moody, Jr., an intervenor in this action, has had full and actual knowledge of the entry of the Court's injunction of January 6, 1976, and of the terms of said injunction.

4. On February 3, 1975, this Court ordered Moody (and others) to appear before the Court on February 18, 1975, and to show cause why he should not be adjudged in civil contempt because of failure to obey and comply with the provisions and terms of the Court's injunction of January 6, 1975. Said show cause order was mailed by this Court to Moody personally by certified mail.

5. By order of this Court duly entered herein on February 18, 1975, in compliance with the request of the Supreme Court of Alabama, the hearing on the show cause order addressed to Moody, and the hearing on other, similar, show cause orders which had been directed by this Court to various agents and attorneys of Moody, was continued until March 10, 1975. Notice of said continuance was duly mailed by this Court to all interested persons, including Moody.

6. On March 10, 1975, at the time and place specified, Moody failed to appear. Two attorneys, who then appeared as counsel of record for Moody, Donald L. Collins and A. Eric Johnston, duly appeared in response to the Court's show cause orders which had been directed to them, but made such appearance only in their individual capacities.

7. The records of this Court indicate that the show cause order that was directed to Moody and duly served upon him by registered mail properly addressed and mailed to him by this Court, was returned to this Court "unclaimed."

8. The motion of Intervenor, Protective Life Insurance Company, for judgments of civil contempt against Moody, and several of Moody's attorneys and agents, was heard before this Court, as indicated above, on March 10, 1975. Upon consideration of the motion and supporting papers, voluminous documentary evidence, oral testimony, and argument of counsel, the Court determined that there exists clear and convincing, uncontested, evidence that:

(a) Moody had full and actual knowledge of the Court's order that Moody appear and show cause why he should not be adjudged in civil contempt for violation of the Court's injunc-

tion of January 6, 1975; and that Moody had full and actual knowledge of the pendency of the proceedings on said show cause order on March 10, 1975.

(b) Moody aided, assisted, and participated in the filing of an amended complaint in that certain case then pending in the United States District Court for the Middle District of Alabama, Northern Division, being Case No. 74-377-N, styled as follows: WILLIE ALLMON V. JOHN G. BOOKOUT, ET AL. [hereinafter *Allmon* case]. Said amended complaint was filed on or about November 22, 1974. The Court is advised that the *Allmon* case has been dismissed and is presently pending on appeal to the United States Court of Appeals for the Fifth Circuit.

(c) The amended complaint in *Allmon* calls into question, in aggravated form, all the proceedings had in this Court in connection with the receivership of Empire. The relief sought by the amended complaint includes a demand for judgment by the federal court

> "restraining and preventing defendants [including the Commissioner of Insurance of Alabama, the duly appointed Receiver of Empire], their agents, servants and employees, and all other persons who receive actual notice . . . from liquidating Empire and from enforcing the Treaty of Assumption and Bulk Reinsurance . . . from taking any further steps to consummate said Treaty . . . and from enforcing or carrying out any order, judgment, or decree entered in the Circuit [Court] for the 10th Judicial Circuit of Alabama in Case No. 171-687 . . . ."

Amended Complaint at pp. 20-21. The relief sought by the

Amended Complaint also includes a demand that the federal court declare

> "that any action taken in the aforesaid case captioned *Alabama ex rel. Bookout v. Empire* is null and void."

Amended Complaint at p. 21.

(d) The approval of this Court was neither sought nor obtained prior to the filing of the aforesaid Amended Complaint.

(e) This Court's Receiver has been subjected to numerous lawsuits in connection with the receivership of Empire; these lawsuits have been filed and prosecuted by Moody, and his attorneys; and these lawsuits have greatly hampered and interfered with the receivership and the implementation of the orders and decrees of this Court relating to the receivership.

(f) Moody has threatened to sue the Receiver, and has threatened to continue to bring such lawsuits against the Receiver for a period of a great number of years. Moreover, Moody has threatened to pursue, by one lawsuit after another, the former Receiver, Judge John G. Bookout, in his individual capacity, until Judge Bookout's death.

(g) The *Allmon* lawsuit was openly and flagrantly solicited by Dale R. Major, an attorney of record for Moody, which attorney misrepresented himself to the named plaintiff in the *Allmon* case as an attorney for Empire Life Insurance Company of America rather than for Moody. At the time the *Allmon* complaint was filed against the Receiver and Protective Life Insurance Company, Allmon had never heard of the Receiver or Protective and knew nothing that either had done to injure him.

(h) After the filing of the *Allmon* lawsuit, which had been solicited by Moody's attorney, another Moody attorney appearing for the plaintiff in the *Allmon* case, Donald L. Collins, on several occasions contacted an ex-employee of the Alabama Insurance Department, Charles E. Hunter, and, in connection with the *Allmon* lawsuit, told Mr. Hunter that Moody was pressuring Collins to take Hunter's deposition in the *Allmon* case.

(i) The lawyers who appear as attorneys of record in the *Allmon* case are attorneys in fact for Moody. The filing of the *Allmon* Amended Complaint was the subject of a conference in Texas attended by Moody and numerous Moody lawyers, which conference was conducted after this Court had entered its preliminary injunction which was incorporated in the permanent injunctive order of January 6, 1975.

(j) No lawyer who purports to be an attorney of record for Allmon discussed the filing of the *Allmon* Amended Complaint with Allmon.

(k) The affidavit of service which accompanies the *Allmon* complaint as amended shows on its face that it was executed in Galveston County, Texas, which this Court knows to be the residence of Moody.

(l) The *Allmon* complaint as amended was filed only by Moody lawyers, all of whom are named in this Court's injunction of January 6, 1975, after the Supreme Court of Alabama had denied a "Petition for a Writ of Mandamus and Writ of Prohibition or Other Remedial Writ" which was brought before the Supreme Court of Alabama on behalf of Shearn Moody, Jr. and others, by Donald L. Collins. The Moody lawyers who filed the Amended Complaint reside in Indiana, Texas and Alabama.

Allmon resides in Star City, Arkansas and had never heard of any of the Moody attorneys until solicited for the filing of the *Allmon* suit.

(m) The filing of the *Allmon* complaint as amended was initiated, sponsored, and aided by Moody, in conjunction with his officers, agents, servants, employees, and attorneys (including Dale R. Major, Donald L. Collins, A. Eric Johnston, and Scott E. Manley, among others).

(n) The filing and prosecution of the *Allmon* case has directly and adversely affected the affairs of Empire, its receivership, its Receiver, and the implementation of the orders and decrees of this Court.

(o) Moody has knowingly and willfully disobeyed and ignored the provisions of the injunction of this Court of January 6, 1975.

(p) By reason of the disobedience and refusal of Moody to comply with the provisions of said injunction, the Receiver, the receivership estate, the Intervenor, Protective Life Insurance Company, and others have suffered substantial damages.

ACCORDINGLY, having made and entered its findings and conclusions, it is

ORDERED, ADJUDGED, and DECREED:

1. That Shearn Moody, Jr. is in civil contempt of this Court for having failed and refused to obey its decrees of January 6, 1975.

2. That Shearn Moody, Jr. purge himself of contempt by taking the following actions:

(a) Fully comply with all of the provisions of the Court's decree of January 6, 1975.

(b) Appear in person before this Court on May 7, 1975, at 8:00 o'clock, A.M., in Room 223, Jefferson County Courthouse, 710 North 21st Street, in the City of Birmingham, Alabama, and then and there explain to this Court:

(i) the reasons why the registered letter mailed to Moody on or about February 3, 1975 bearing the return address of this Court was not accepted by Moody when delivered to him;

(ii) the reasons why Moody failed to appear before this Court at the proceedings held herein on March 10, 1975;

(c) Take whatever action may be necessary to withdraw or cause to be withdrawn any and all support (financial or otherwise), aid or assistance which the said Shearn Moody, Jr. has provided or continues to provide to any of his agents, servants, employees or attorneys, which support, aid or assistance relates to the filing or the maintenance of that certain case now pending on appeal from the United States District Court for the Middle District of Alabama, Northern Division, being Case No. 74-377-N, styled as follows: WILLIE ALLMON VS. JOHN G. BOOKOUT, ET AL.

(d) File with this Court, within ten (10) days after the entry of this Order, a sworn statement setting forth in detail an accounting of all fees paid and other compensation or things of value furnished, since November 1, 1974 by or on behalf of Moody to any of the following persons or firms: Donald L. Collins; A. Eric Johnston; the firm of Collins & Johnston; Dale R. Major; Scott E. Manley; the firm of Saxe, Bacon, Bolen & Manley or any of its members or employees.

(e) Require that each of the foregoing persons or firms or

employees immediately furnish to the said Shearn Moody, Jr. sworn statements setting forth in detail:

(i) the amount of any and all fees received by the foregoing persons from Moody or his agents or persons acting in concert with Moody or his agents since November 1, 1974;

(ii) the amount of any and all funds expended by the foregoing persons since November 1, 1974, which funds relate in any way to the *Allmon* lawsuit, the affairs of Empire, its Receiver, or the receivership estate; and

(iii) the exact purpose for which such expenditures were made, identifying with particularity the lawsuit, legal proceeding or other matter to which such expenditures were or are related.

The aforementioned sworn statements shall also itemize with particularity all funds or other compensation advanced by the foregoing persons, firms or employees to any other person or firm in connection with the *Allmon* lawsuit. Upon receipt of said sworn statements by Moody, the same shall be forthwith filed with this Court.

(f) File with this Court within ten (10) days after the entry of this Order a sworn statement setting forth in detail a record of all meetings and conferences attended by Moody since November 1, 1974 at which the *Allmon* lawsuit or the matters and things alleged in the *Allmon* complaint as amended came under discussion. Said sworn statement shall include the dates and places of any such meeting and conference and the names of all persons present.

(g) Discharge any and all agents, servants, employees, and

attorneys presently employed, directly or indirectly, by or on behalf of Moody, whose employment is or has in any way related to the filing or the litigation of the *Allmon* suit, unless it be affirmatively shown under oath that any such person had no knowledge of this Court's injunction of January 6, 1975; and provide this Court with written evidence of each such discharge within ten (10) days of the entry of this order.

(h) Appear in person before this Court on May 12, 1975, at 8:00 o'clock, A.M., in Room 223, Jefferson County Courthouse, 710 North 21st Street in the City of Birmingham, Alabama, and at such further times and places as the Court may direct, and show to the Court that this Order has been fully complied with.

(i) Pay to Protective Life Insurance Company and the Receiver any and all costs and expenses incurred by them as a result of the failure and refusal of Moody to comply with the January 6, 1975 order, including, but not limited to, all costs of the contempt proceedings, including costs of investigation, preparation for and conduct of such proceeding, the costs of defending against the *Allmon* suit, and any and all reasonable attorneys' fees.

(j) Promptly comply with any further orders of this Court relating to this matter.

IT IS FURTHER ORDERED, that Shearn Moody, Jr., be and he hereby is ordered to pay to the Clerk of this Court a fine of Five Thousand Dollars ($5,000.00) per day, each day, until he shall have purged himself of contempt of this Court; PROVIDED, however, in order that Moody may have an opportunity to demonstrate that he has brought himself into compliance with this Court's injunction of January 6, 1975, said fine shall not be effective until further order of this Court.

IT IS FURTHER ORDERED, that at 10:00 o'clock, A.M., on May 19, 1975, this Court shall conduct a hearing to determine the extent and amount of damages sustained by any person or party by reason of the failure and refusal of Shearn Moody, Jr. to comply with the Court's injunction of January 6, 1975.

IT IS FURTHER ORDERED, that this Court's order of March 10, 1975 finding Shearn Moody, Jr. in civil contempt of the January 6, 1975 injunction be and it hereby is VACATED.

DONE this 30th day of April, 1975.

/s/ WM. C. BARBER
CIRCUIT JUDGE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1845

EX PARTE: SHEARN MOODY, JR.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of the State of Alabama

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1845

EX PARTE: SHEARN MOODY, JR.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of the State of Alabama

INTRODUCTION

Petitioner Shearn Moody, Jr. ("Moody"), seeks issuance of the Writ of Certiorari, to review an Order of the Supreme Court of Alabama entered on July 25, 1977. In that Order, the Alabama Supreme Court declined to review, by way of writ of certiorari, an Order and Decree entered November 1, 1976 by the Circuit Court for the Tenth Judicial Circuit of Alabama during the course of protracted receivership proceedings involving Empire Life Insurance Company of America ("Empire"), an insolvent Alabama insurance company. Respondents are Protective Life Insurance Company ("Protective") and Charles H. Payne, the Commissioner of Insurance of the State of Alabama, who is the court-appointed receiver in the proceed-

ings before the Alabama trial court and is hereafter referred to as "Receiver." The Alabama trial court is hereinafter referred to as "receivership court." This brief in opposition to Moody's Petition for Writ of Certiorari is filed jointly on behalf of Protective and the Receiver.

OPINIONS BELOW

Moody identifies and appends to his Petition two Orders of the Supreme Court of Alabama—the first of which denies Moody's petition for writ of certiorari to review the November 1, 1976 Order and Decree of the receivership court (Pet., App. A); the second of which refuses Moody's application for rehearing (Pet., App. B). Respondents respectfully refer the Court to the following reported opinions by the Supreme Court of Alabama which relate closely to the matters involved in the Petition presently before this Court. *Shearn Moody, Jr. v. State of Alabama ex rel. Charles H. Payne, Comm'r of Ins.*, — Ala. —, 344 So.2d 160 (Feb. 11, 1977) [hereinafter, *Moody v. Payne*]; *Shearn Moody, Jr. v. State of Alabama ex rel. Charles H. Payne, Comm'r of Ins.*, 295 Ala. 299, 329 So.2d 73 (1976) [hereinafter, *Moody v. State*]. For convenient reference, these opinions are appended hereto as "Appendix A" and "Appendix B," respectively.

JURISDICTION

This Court lacks jurisdiction under the statutory provision relied upon by Petitioner, 28 U.S.C. § 1257(3) (1970). The Petition is ambiguous as to which order of which Alabama court is sought to be reviewed. If the Order sought to be reviewed in this Court is, as Moody asserts, the January 25, 1977 Order of the Supreme Court of Alabama denying his petition for writ of certiorari, jurisdiction of this Court is lacking for

the following reasons. First, it affirmatively appears on the face of the petition for writ of certiorari filed with the Alabama Supreme Court that Moody failed to raise in that court any of the federal constitutional questions sought to be reviewed in this Court. (Pet. A-26 to A-31). Second, the denial by the Alabama Supreme Court of Moody's petition for certiorari does not amount to an affirmance of the November 1, 1976 Order and Decree of the Alabama receivership court. It clearly appears on the face of the Petition filed in this Court (Pet. 8) that Moody has appealed to the Alabama Supreme Court from the self-same decree of the receivership court which the Alabama Supreme Court declined to review on Moody's petition for writ of certiorari. The decree of the receivership court is presently under submission to the Alabama Sureme Court on Moody's appeal, briefs having already been filed and oral argument heard.

If the Order sought to be reviewed in this Court is deemed to be the Order and Decree entered by the Alabama receivership court on November 1, 1976, by reason of the Alabama Supreme Court's refusal to entertain discretionary review of said Order on January 25, 1977, jurisdiction of this Court is lacking for the following reasons. First, the decree of the Alabama receivership court is not a final judgment under Alabama law or 28 U.S.C. § 1257(3) (1970). The Petition asserts the decree of the receivership court is a "money judgment." (Pet. at 2). The decree itself, however, shows on its face that determination of damages is deferred to a future date. (Appendix E attached hereto). The appellate jurisdiction of this Court to review judgments or decrees of state courts is expressly restricted to final judgments, and this Court has repeatedly held that a judgment which leaves damages for future determination is not a final judgment within the meaning of 28 U.S.C. § 1257(3) (1970). Second, even were the decree of the receivership court deemed final, the Petition filed with this Court affirmatively demonstrates that no attempt was made by Petitioner to set up or claim any federal constitutional right either in the proceed-

ings before the receivership court or in the petition for certiorari filed with the Supreme Court of Alabama. As the timely presentation and preservation in the state courts of the federal questions to be reviewed by certiorari are essential prerequisites to the jurisdiction of this Court, there is no jurisdictional basis on which the purported federal questions raised for the first time here by Moody can be reviewed. Third, as indicated above, the decree of the Alabama receivership court is presently under submission to the Supreme Court of Alabama upon an appeal taken by Petitioner before this Court. Thus, the receivership court's November 1, 1976 Order and Decree is not a decree "rendered by the highest court" of Alabama in which a decision may be had. 28 U.S.C. § 1257(3) (1970).

STATUTE INVOLVED

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * * * * * *

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

(28 U.S.C. § 1257(3) (1970)).

QUESTIONS PRESENTED

1. Does this Court possess jurisdiction to review the Order of the Supreme Court of Alabama entered January 25, 1977?

2. Does this Court possess jurisdiction to review the Order and Decree of the Circuit Court for the Tenth Judicial Circuit of Alabama entered November 1, 1976?

3. Did Petitioner raise any substantial federal question in a proper and timely manner in the Alabama trial court?

4. Did Petitioner preserve on his petition for writ of certiorari filed with the Supreme Court of Alabama any substantial federal question claimed to have been raised in the Alabama trial court?

STATEMENT OF THE CASE

Petitioner Moody is the former President, Chairman of the Board, and principal stockholder of Empire Life Insurance Company of America ("Empire"), an Alabama insurance company. In 1971 a statutory examination of Empire by the Alabama Department of Insurance revealed that Empire was insolvent in excess of $6,000,000; thereafter, the then Commissioner of Insurance of the State of Alabama, John G. Bookout, filed a complaint in the Circuit Court for the Tenth Judicial Circuit of Alabama requesting that Empire be placed in receivership in accordance with the Alabama Uniform Insurers Liquidation Act, Title 28A, Chapter 28, *Code of Alabama* (1940, as amended). In 1972 the Commissioner of Insurance was appointed Receiver of Empire. No appeal was taken by Empire or any of its officers from the decree placing the company in receivership.

After efforts to rehabilitate Empire proved futile, the Receiver, with the approval of the receivership court, determined that Empire should be liquidated and its policies reinsured with a reputable and solvent company. Advertisements soliciting reinsurance proposals were published, and respondent Protective (along with several other companies and persons) submitted a

proposal for reinsurance. The Receiver, acting in concert with the ancillary receiver of Empire appointed in the State of Texas, determined that the Protective reinsurance proposal was the best of those received. Thereafter, the Receiver petitioned the receivership court for authority to accept the Protective proposal. Following a three week trial, to which Moody and Protective were parties, on June 14, 1974 the receivership court approved the Protective reinsurance proposal and authorized the Receiver to accept it. Moody perfected an appeal to the Supreme Court of Alabama from the receivership court's order approving the Protective reinsurance proposal.[1]

After the plenary hearing by the receivership court which resulted in the decree approving the Protective reinsurance proposal, and pending his appeal from said decree to the Alabama Supreme Court, Moody initiated numerous separate lawsuits and proceedings against the Receiver. By express statutory provision, Title 28A, § 624 *Code of Alabama* (1958 Recomp., as supplemented), the receivership court had authority to enjoin such interference with the Receiver, the receivership proceedings, or the receivership assets. The Alabama statute expressly authorizes the receivership court to enjoin the consummation or prosecution of actions. In December 1974, the Receiver invoked the foregoing statutory authority by instituting an injunction proceeding against Moody in the receivership court. After a hearing on January 6, 1975, the receivership court entered a permanent injunction enjoining Moody, and certain of his attorneys named in the injunction, from interfering with the Empire receivership proceedings.

On five separate occasions, Moody sought to invalidate the receivership court's January 6, 1975 Injunction against him in

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[1] The Supreme Court of Alabama affirmed. *Moody v. Payne*, — Ala. —, 344 So. 2d 160 (1977) (copy of opinion attached hereto as Appendix A). Petitioner Moody filed Notice of Appeal to this Court on April 28, 1977 (Appendix H attached hereto).

extraordinary proceedings and applications for rehearing filed in the Supreme Court of Alabama.[2] On each occasion the Alabama Supreme Court refused to disturb the Injunction.[3] Having failed to secure extraordinary relief, Moody perfected an appeal from the injunction.[4] The Supreme Court of Alabama affirmed, holding that the injunction against Moody "was not only justified but was necessary to preserve the assets of Empire." *Moody v. State ex rel. Payne*, 295 Ala. at 306 (1976).

One of the grounds on which the Injunction against Moody was based was a lawsuit filed by Moody's lawyers against the Receiver and Protective in federal district court for the Middle District of Alabama, styled *Willie Allmon, etc. v. John G. Bookout, et al.* (Civil Action No. 74-377-N). On Moody's appeal from the Injunction, the Supreme Court of Alabama concluded that the evidence unequivocally established that the *Allmon* suit against the Empire Receiver had been solicited by Moody's agents and attorneys. 295 Ala. at 303. The Alabama Supreme Court held that through the *Allmon* suit Moody was attempting to stop the liquidation of Empire in the receivership court. The original complaint in *Allmon* sought, *inter alia*, to enjoin consummation of the Protective reinsurance proposal. 295 Ala. at 308.

The January 6, 1975 Injunction against Moody enjoined Moody and certain of his attorneys who were explicitly named

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[2] January 17, 1975 (Supreme Court of Ala. No. 1125); February 10, 1975 (S. Ct. Ala. No. 1125); April 10, 1975 (S. Ct. Ala. No. 1221); April 24, 1975 (S. Ct. Ala. No. 1221); March 26, 1975 (S. Ct. Ala. No. 1200).

[3] January 27, 1975 (S. Ct. Ala. No. 1125); March 6, 1975 (S. Ct. Ala. 1125); April 23, 1975 (S. Ct. Ala. No. 1221); May 6, 1975 (S. Ct. Ala. No. 1221); and November 11, 1975 (S. Ct. Ala. No. 1200).

[4] S. Ct. Ala. No. 1269. The Supreme Court of Alabama affirmed. *Moody v. State*, 295 Ala. 299, 329 So. 2d 73 (1976) (opinion attached hereto as Appendix B).

in the injunction, from filing any actions or any amendments to any existing actions without the prior approval of the receivership court. Moody proceeded, apparently unfazed, to violate the injunction. On January 28, 1975, following a group meeting of Moody and his counsel to plot strategy in the *Allmon* case (R. 151), Moody's house counsel—one of the Moody attorneys specifically named in the injunction—and two other Moody attorneys also named in the injunction filed an extensive amendment to the *Allmon* complaint (R. 725-47). The amended complaint added several Protective officers as defendants and sought $40,000,000 against them individually. More significantly, the amendment expressly sought the nullification of every single order ever entered by the receivership court in the Empire receivership proceedings. (R. 745).

Thereafter, following a hearing in the receivership court on March 10, 1975, Moody and several of his attorneys were adjudged in open and flagrant civil contempt of the receiveship court for filing the *Allmon* amended complaint.[5] Moody petitioned the Alabama Supreme Court for issuance of extraordinary writs relating to the contempt proceedings.[6] By Order entered April 23, 1975, the Alabama Supreme Court directed the receivership court to show cause why it should not be required to specify in detail what would be required of Moody to purge himself of contempt. Thereafter, by Order entered April 30, 1975, the receivership court entered extensive findings of fact, adjudicated Moody in civil contempt, and specified in detail what acts were required of Moody to purge himself of contempt and to bring himself into compliance with the January 6, 1975 Injunction. (Appendix C attached hereto).

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[5] As established by the receivership court's Order of April 30, 1975, Moody failed to appear at the civil contempt show-cause hearing. (Appendix C attached hereto).

[6] S. Ct. Ala. No. 1221. The extraordinary writs were denied, and the Alabama Supreme Court refused to stay the contempt proceedings against Moody.

Though Moody sought to have the April 30, 1975 contempt adjudication and specification of acts necessary to purge himself vacated or stricken by the Alabama Supreme Court by extraordinary writ,[7] the effort failed. Moody sought no direct appellate review in the Alabama Supreme Court of the April 30, 1975 Order; Moody likewise never sought any clarification or modification of the April 30, 1975 Order in the receivership court.

The April 30, 1975 Order specified that among the actions required of Moody to purge himself of civil contempt was that Moody appear in person "at such . . . times and places as the Court may direct, and show to the Court that this Order has been fully complied with." (Appendix C attached hereto). By Order entered June 16, 1976 the receivership court scheduled an evidentiary hearing for the foregoing purpose. (Appendix D attached hereto). The hearing was set for July 19, 1976, and Moody was commanded to appear. The June 16, 1976 Order specified that the purpose of the July 19, 1976 hearing was for Moody to demonstrate to the receivership court that he had purged himself of contempt and had fully complied with the April 30, 1975 Order.

Moody failed to appear on July 19, 1976 as ordered. However, three of his lawyers appeared on his behalf. One of them sought a continuance, solely on the basis of a letter from a Galveston, Texas doctor. The full text of the letter is quoted below:

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[7] S. Ct. Ala. No. 1221. The request for relief was denied on May 6, 1975.

July 14, 1976

The Honorable William C. Barber
10th Judicial District Court
of Alabama
County Court House
Birmingham, Alabama

RE: Shearn Moody, Jr.

Your Honor,

The above patient has seen me in the past and is seeing me again today in my office. He is ill with several illnesses. I would recommend that he not travel outside of the immediate geographical area here because of his medical problems for the next month. I plan to see him again in a few days. He will also have some additional tests later on this week.

Respectfully Yours,

/s/ E. B. Vogelpohl Jr. M.D.

EBV/ee

The letter was presented to the Court at the time of the scheduled hearing. No effort had been made by Moody or on his behalf to notify the receivership court in advance that a continuance would be sought, though the hearing had been scheduled more than 30 days previously. The receivership court denied the continuance.

At the hearing on July 19 substantial documentary evidence and oral testimony of witnesses was received. No testimony was offered on behalf of Moody, however. On the basis of the evidence, the receivership court concluded that Moody failed to purge himself of contempt and had failed to comply with the April 30, 1975 Order. (November 1, 1976 Order and Decree; Appendix E attached hereto). Moody was also ordered to pay to

Protective and the Receiver certain damages sustained by them as a proximate consequence of the contempt; this portion of the order is expressly interlocutory in that the determination of damages was specifically set for hearing at a future date.[8]

Shortly after the entry of the November 1, 1976 Order and Decree, Moody filed in the Alabama Supreme Court a petition for writ of certiorari to review said order of the receivership court.[9] On the same day that Moody filed his petition for certiorari with the Alabama Supreme Court, November 23, 1976, he filed a Notice of Appeal to the Alabama Supreme Court from the same Order and Decree. (Appendix G attached hereto). Said appeal has been designated Ala. S. Ct. No. 2215. Briefs have been filed; oral argument was heard by the Alabama Supreme Court on June 13, 1977, and the case is presently under submission to the Supreme Court of Alabama.

On January 25, 1977, the Supreme Court of Alabama denied Moody's petition for writ of certiorari to review the receivership court's Order and Decree of November 1, 1976. On February 22, 1977, the Supreme Court of Alabama refused to consider Moody's application for rehearing. Thereafter, the instant Petition for Certiorari to the Supreme Court of Alabama was filed in this Court.

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[8] Within a short time after entry of the November 1, 1976 Order and Decree upon which Moody's Petition to this Court is based, separate hearings in ancillary proceedings were conducted by the receivership court to determine the amount of damages sustained by Protective and the Receiver. Money judgments against Moody were entered at the conclusion of each separate hearing. Moody has perfected appeals to the Supreme Court of Alabama from each money judgment; the appeals have been designated Ala. S. Ct. No. 2264 and Ala. S. Ct. No. 2453. Extensive briefs have been filed in each appeal, and the appeals have been consolidated for oral argument before the Alabama Suprme Court.

[9] Moody's petition for writ of certiorari filed in the Alabama Supreme Court is attached hereto as Appendix F.

ARGUMENT

I

The Federal Questions Petitioner Seeks to Raise Were Not Timely and Properly Raised So as to Give the Supreme Court of the United States Jurisdiction to Review the Proceedings Below on Writ of Certiorari.

Rule 23(f) of the Revised Rules of The Supreme Court of the United States requires that a petition for writ of certiorari to a state court must demonstrate with specificity that the federal questions sought to be reviewed were appropriately raised in both the state court of first instance and the state appellate court.

> "(f) If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari."

This rule embodies a long line of case authority holding that this Court will not consider federal constitutional issues raised for the first time in a petition for writ of certiorari to review a state court decision. *E.g., Monks v. New Jersey*, 398 U.S. 71 (1970); *Cardinale v. Louisiana*, 394 U.S. 437 (1969); *American Surety Company v. Baldwin*, 287 U.S. 156 (1932); *Missouri Pacific Railroad Company v. Hanna*, 266 U.S. 184 (1924). This Court has made it particularly clear that no jurisdiction to exercise review by certiorari exists unless the record affirmatively shows that the federal question was presented to the highest state court having jurisdiction and that its decision of the federal question was necessary to its determination of the cause. *E.g., Durley v. Mayo*, 351 U.S. 277 (1956); *Williams v. Kaiser*, 323 U.S. 471 (1945); *Honeyman v. Hanan*, 300 U.S. 14 (1937); *Lynch v. New York ex rel. Pierson*, 293 U.S. 52 (1934).

The conspicuous failure of the Petition here to comply with the requirements of Supreme Court Rule 23(f) and, concomitantly, to establish a jurisdictional basis for consideration of the Petition is attributable to the fact that the purported federal questions Petitioner seeks to raise before this Court were never raised before the receivership court or before the Supreme Court of Alabama. Petitioner does not specify in his Petition the manner in which such federal questions were raised before the receivership court and does not quote specific portions of the record in substantiation for the simple reason that no such federal questions were ever put in issue before the receivership court by the Petitioner.[10]

Moreover, it is plain from the face of Moody's petition for writ of certiorari filed with the Alabama Supreme Court that

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[10] Petitioner may contend that his reference to a constitutional objection to Paragraph (g) of the Order of April 30, 1975 (which objection was included in a Memorandum Brief submitted after the July 19, 1976 hearing) served to present the federal issue with regard to that particular question to the receivership court. However, it is well settled that a brief does not suffice to establish that a federal question was properly or timely raised before a state court. *Lynch v. New York ex rel. Pierson*, 293 U.S. 52 (1934); *Live Oak Water Users' Association v. Railroad Commission*, 269 U.S. 354 (1926); *Zadig v. Baldwin*, 166 U.S. 485 (1897).

On page 6 of his Petition, Moody quotes from bench comments made by the receivership court during the July 19, 1976 hearing. Petitioner apparently means to imply that the receivership court re-

no federal issues were raised by Petitioner before the Alabama Supreme Court:

> "10. The issues presented for review by this petition are as follows:
>
> (a) Whether a civil contempt proceeding may be maintained after the orders and decrees which it purports to enforce or aid in enforcing have been fully executed.
>
> (b) Whether a party adjudged guilty of civil contempt can be ordered to pay all costs and expenses incurred by reason of the investigation, preparation for, and conduct of civil contempt proceedings against him.
>
> (c) Whether a party adjudged guilty of civil contempt can be ordered to pay attorneys' fees incurred by the parties bringing the contempt action against him.
>
> (d) Whether a party adjudged guilty of civil contempt can be required to pay all costs, damages, and expenses incurred by other parties to the action as a result of his failure to purge himself of civil contempt.
>
> (e) Whether or not the evidence supports the findings and orders of the said "Order and Decree" dated November 1, 1976."
>
> (Appendix F attached hereto).

Petitioner has not demonstrated and, in fact, cannot demonstrate that the federal questions he seeks to have reviewed by this Court were timely raised and preserved in the state courts. Accordingly, this Court has no jurisdiction to review such questions by writ of certiorari.

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fused to permit him to file any pleadings in which the federal issues could have been presented. Aside from the fact that the bench comments are quoted entirely out of context and the full transcript of the hearing does not support at all Moody's strained implication, it is to be noted that Petitioner filed no pleadings prior to the July 19 hearing in which the federal questions were raised, and that no pleading tendered by Petitioner after the July 19 hearing was rejected by the receivership court.

II

This Court Is Without Jurisdiction to Issue a Writ of Certiorari With Regard to the Order of November 1, 1976 Because the Order Is Not a Final Judgment or Decree Within the Meaning of 28 U.S.C. § 1257.

The jurisdiction of the United States Supreme Court to review state court judgments by certiorari is limited to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had. . . ." 28 U.S.C. § 1257 (1970). Wholly apart from Petitioner's failure to timely and properly raise in the courts below the federal questions which he seeks to have reviewed here, the Petitioner, as an additional error, has prayed that this Court direct its writ of certiorari to the wrong state court. Where, as here, a state appellate court has declined to exercise its powers of discretionary review over a trial court judgment, the lower-court judgment becomes that of the highest state court in which a decision could be had. *Minneapolis, St. Paul & Sault Ste. Marie Railway Company v. Rock*, 279 U.S. 410 (1929); *Virginian Railway Company v. Mullins*, 271 U.S. 220 (1926). Thus, if the November 1, 1976 Order and Decree of the receivership court could be said to be final within the meaning of 28 U.S.C. § 1257 (1970), it is that court, if any, to which the writ of certiorari would be directed.

However, the Order and Decree of November 1, 1976 cannot be said to be final within the meaning of 28 U.S.C. § 1257. The primary reason for which finality is lacking is the pendency of an appeal by Petitioner to the Supreme Court of Alabama from the November 1 Order and Decree of the receivership court. The appeal has been briefed and orally argued, and now awaits action by the Supreme Court of Alabama. Due to Moody's appeal to the Alabama Supreme Court, the receivership court's Order and Decree of November 1 is not subject to the certiorari jurisdiction of the United States Supreme Court.

> "[The Supreme Court's] jurisdiction to review a state court judgment is confined by longstanding statute to one which is final. (Citation to Judicial Code omitted). Final it must be in two senses: It must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court."
>
> *Market Street Railway Company v. Railroad Commission*, 324 U.S. 548, 551 (1948).

The receivership court's November 1 Order and Decree is not final in either of the two senses described in the *Market Street Railway Company* opinion. While the appeal to the Supreme Court of Alabama is pending, the November 1 Order and Decree remains subject to review or correction by another state tribunal. Moreover, inasmuch as the November 1 Order and Decree merely recites Petitioner's liability for the payment of damages to the parties he injured by his contumacious conduct and orders an additional hearing for determination of the amount of damages to be paid, it comprises merely an interlocutory order: "[T]he requirement of finality has not been met merely because the major issues in a case have been decided and only a few loose ends remain to be tied up—for example, where liability has been determined and all that needs to be adjudicated is the amount of damages." *Republic Natural Gas Company v. Oklahoma*, 334 U.S. 62, 68 (1948), *citing Bruce v. Tobin*, 245 U.S. 18 (1917); *Martinez v. International Banking Corporation*, 220 U.S. 214 (1911); *Mississippi Central Railroad Company v. Smith*, 295 U.S. 718 (1935).

The November 1, 1976 Order of the receivership court is not "the final word of a final court" and is therefore not within the certiorari jurisdiction of the United States Supreme Court under 28 U.S.C. § 1257.

III

The Reasons Advanced by Petitioner for Granting the Writ Are Inadequate and Misstate Essential Facts.

Petitioner argues three reasons why the Writ of Certiorari should be granted. First, it is contended that Moody was denied due process of law because he was not provided sufficient notice and opportunity to be heard (Pet. 9-14). Second, it is contended that Moody was denied due process of law because the November 1, 1976 Order and Decree of the Alabama receivership court found him "to be in civil contempt of court" for failing to do that which Moody was unable to do. (Pet. 14-15). Third, it is contended that the April 30, 1975 Order of the Alabama receivership court violated Moody's First Amendment right of freedom of association and denied him due process of law by requiring Moody to terminate employment of certain attorneys. (Pet. 15-18). The foregoing reasons are totally unfounded and depend upon gross misstatement of essential facts.

A. Petitioner was provided ample notice and opportunity to be heard; there was no denial of due process of law.

The June 16, 1976 Order (Appendix D attached hereto), which recites on its face that it was issued pursuant to the April 30, 1975 Order adjudging Moody in civil contempt, provided Moody and his attorneys ample notice of the hearing to be conducted on July 19, 1976 for the purpose of Moody's demonstrating that he had purged himself of contempt and had fully complied with the April 30, 1975 Order. All parties were given leave to adduce evidence at the July 19 hearing. (*Id.*). Moody failed to appear as ordered; he was, however, represented by three attorneys. On the basis of the evidentiary hearing, the receivership court concluded in its November 1,

1976 Decree that Moody had failed to purge himself of civil contempt and had failed to comply with the April 30, 1975 Order. (Appendix E attached hereto). The November 1 Order and Decree thus adjudicated the very issues specified by the June 16 Order.

Moody cannot legitimately claim any surprise or insufficiency of notice as to what was required of him under the terms of the April 30, 1975 civil-contempt adjudication and specification of what was necessary of Moody to purge himself. Moody himself invited entry of the April 30, 1975 Order in extraordinary proceedings before the Alabama Supreme Court (S. Ct. Ala. No. 1221) in which Moody demanded a specification of what was required to purge himself of contempt. When the April 30, 1975 Order was entered, Moody sought (and failed) to have it nullified in the Alabama Supreme Court (*Id.*). However, Moody never sought any clarification or modification of the April 30, 1975 Order in the receivership court, and he never sought ordinary appellate review, by appeal or certiorari, of the April 30 Order in any higher court.

The April 30, 1975 Order is, and was at the time of the hearing in the receivership court on July 19, 1976, final and binding upon Petitioner.

Petitioner's claim that he was denied an opportunity to be heard is nothing more than an attack upon the receivership court's refusal to grant a continuance of the hearing scheduled by the June 16, 1976 Order. No formal motion for continuance was filed. Though the hearing had been scheduled over thirty days previously, and though Moody was represented by three separate law firms, no effort was made by Moody to secure a continuance until the actual commencement of the hearing sought to be postponed. Petitioner asserts in brief to this Court that he was "too ill to appear before the court to testify in his own behalf" (Pet. at 11); this statement is unsupported by the

record. The sole basis on which the continuance was sought was the Galveston doctor's letter presented at the time of the hearing. It is quoted in full in our Statement of the Case; it provided the receivership court no information at all.

With respect to Moody's argument that a money judgment was entered against him without his being given sufficient notice to accord with due process (Pet. 11-13), we submit that no money judgment was entered against Moody by the receivership court's Order and Decree of November 1, 1976. It is true that the Decree orders Moody to pay certain undetermined damages incurred by Protective and the Receiver as a result of Moody's failure to obey the January 6, 1975 Injunction and April 30, 1975 Order, but liability for such damages flows inexorably from the adjudication of Moody's contempt[11] and, at any rate, Moody's liability to pay such damages was established not by the Order which is the subject of the instant Petition, but by the April 30, 1975 Order of the receivership court, which expressly ordered that Moody:

> "Pay to Protective Life Insurance Company and the Receiver any and all costs and expenses incurred by them as a result of the failure and refusal of Moody to comply with the January 6, 1975 order, including, but not limited to, all costs of the contempt proceeding including costs of investigation, preparation for and conduct of such proceeding, the costs of defending against the *Allmon* suit, and any and all reasonable attorneys' fees."
>
> (Appendix C attached hereto).

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[11] Upon an adjudication of contempt in the courts of Alabama, the amount of damages resulting from the contempt is to be determined in ancillary proceedings instituted on petition of the aggrieved party. *Lightsey v. Kensington Mortgage and Finance Corp.*, 294 Ala. 281, 314 So. 2d 901 (1975). Such ancillary proceedings were, in due course, instituted against Moody and resulted in the entry of money judgments against him. Moody has perfected appeals to the Supreme Court of Alabama from such judgments. (S. Ct. Ala. Nos. 2264 and 2453).

Moody made no appeal from the April 30 Order. Moody's counsel admitted in open court during the course of the subject hearing on July 19, 1976 in the receivership court Moody's responsibility to pay such damages:

> "The only item found by Your Honor, the only remaining item, as I understand it from talking to counsel, [is] the fixation at a future date of certain fees and expenses which Your Honor has assessed against [Moody], and that his payment of those is a final step in the completion of the purging of contempt."
>
> (R. 928).

Certainly, Moody, having been adjudged in civil contempt for violating the January 6, 1975, Injunction; having been ordered to pay the Receiver and Protective their costs and expenses flowing therefrom on April 30, 1975; having failed to purge himself of contempt by July 19, 1976; and having acknowledged through counsel his liability for such costs and expenses, cannot successfully maintain that he was deprived of constitutional due process or any other procedural right when the court below reiterated in its Decree of November 1, 1976, Moody's liability to the Receiver and Protective flowing from his violation of the January 6, 1975 Injunction and his failure to purge himself of contempt.

B. The April 30, 1975, Order of the Alabama Receivership Court, Which Adjudicated Petitioner in Civil Contempt, Provides No Basis for Granting Certiorari to Review the November 1, 1976, Order.

Petitioner asserts that the November 1, 1976 Decree of the receivership court violates due process of law by Finding Petitioner "to be in civil contempt" for failing to comply with the April 30, 1975 Order. (Pet. at 14-15). This contention

is a sham. The November 1, 1976 Decree does not contain a contempt adjudication. (Appendix E attached hereto). Moody was adjudicated in civil contempt on April 30, 1975, for having wilfully disobeyed the January 6, 1975 Injunction of the receivership court. (Appendix C attached hereto). No showing of "inability to comply" with the April 30, 1975 Order was made by Moody before the Alabama state courts. Moody never sought modification or appellate review of the April 30 Order in the courts of Alabama, and that order is beyond review by this Court. Based on the foregoing analysis, Petitioner's second reason for granting certiorari is due to be rejected.

The last reason urged by Moody for granting the Petition asserts that the April 30, 1975 Order of the receivership court is void as violative of Petitioner's right of freedom of association. (Pet. 15-18). The contention is that a portion of the receivership court's Decree of November 1, 1976 (Appendix E attached hereto) relies on a portion of the April 30, 1975 Order (Appendix C attached hereto) that is overbroad. As demonstrated, the April 30, 1975 Order is beyond review on certiorari by this Court. Even were the April 30 Order assumed to be subject to review in this Court, Moody's argument is not factually supported, either by his Petition or by the record before the Alabama court.

CONCLUSION

Based on the foregoing authorities and analysis, the Petition for a Writ of Certiorari to the Supreme Court of the State of Alabama is due to be denied.

Respectfully submitted,

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Proof of Service

Proof of service of three copies of Respondents' Brief in opposition to Petition for Writ of Certiorari upon all parties separately represented by counsel was filed by Drayton Nabers, Jr., a member of the Bar of the United States Supreme Court, with the Clerk of the United States Supreme Court on the same date the brief in opposition was filed.

APPENDIX

APPENDIX A

Shearn MOODY, Jr.

v.

STATE of Alabama ex rel. Charles H. PAYNE, Commissioner of Insurance and Receiver of Empire Life Insurance Co. of America.

SC 931, 1268 and 1270.

Supreme Court of Alabama.

Feb. 11, 1977.

Rehearing Denied April 22, 1977.

* * * * * * *

BEATTY, Justice.

This is an appeal from an adjudication of insolvency, an order of liquidation and approval of a reinsurance agreement as ordered by the Circuit Court of Jefferson County. We affirm.

The material facts of this case are reported in *Moody v. State ex rel. Payne, Commissioner*, 295 Ala. 299, 329 So.2d 73 (1976), thus only a brief factual review is necessary here.

On April 13, 1972 the Commissioner of Insurance of the State of Alabama instituted a receivership proceeding in the Circuit Court of Jefferson County against Empire Life Insurance Company, an Alabama corporation. The trial court placed Empire in receivership on June 29, 1972, appointed the Commissioner as receiver, and on September 12, 1973 entered an order authorizing him to solicit offers from other insurance companies for the reinsurance om Empire. Later, in January, 1974 the receiver petitioned the Court for an order of liquidation

of Empire and for approval of a reinsurance agreement presented by Protective Life Insurance Company, which later intervened. Shearn Moody, chairman of the board and the largest single stockholder of Empire, intervened. After a hearing on the receiver's petition, the relief requested was granted on June 14, 1974.

On October 15, 1974, Moody filed a motion, later amended, under Rule 60(b), ARCP, to introduce new evidence establishing the solvency of Empire as of the date of the liquidation decree. This motion was overruled on November 22, 1974. Subsequently, the receiver petitioned for approval of an amendment to the reinsurance agreement. This petition was granted over Moody's objections, and on April 10, 1975, the trial court by decree authorized the receiver to execute the amendment.

Essentially, Moody raises three issues: (1) that the trial court erred in denying Moody's 60(b) motion; (2) that policyholders of Empire were discriminated against as a result of the trial judge's reinsurance order; and (3) that the trial court abused its discretion in ordering liquidation and reinsurance. We shall take up the issues presented *seriatim*.

Moody contends that the trial court erred in denying his Rule 60(b) motion for relief from the decree of June 14, 1974. Evidence he obtained from a post-judgment appraisal of one of Empire's assets, an interest in the Libbie Shearn Moody Trust, establishing an asset value of approximately $14,000,000 instead of the $4,250,000 value given it by the Commissioner, he asserts, justified a new hearing. The appraisal referred to in his motion was made by Mr. Harold Crandall, who had testified as an expert witness for Moody at the April, 1974 hearing. Although the Crandall appraisal was referred to in the motion as Exhibit B, it was neither attached to the motion nor submitted to the Court. Indeed, on November 15, 1974 when Moody's attorneys argued the motion, they submitted a different appraisal, one made by Dr. Joseph Trosper. Trosper's appraisal expressly recited that its author had not been contacted by Moody until October 18, 1974, three days after Moody's Rule 60(b) motion was filed. Moody did not explain why this appraisal could not have been either the subject of his motion or procured prior to the April hearing.

Rule 60(b)(2), ARCP, authorizes relief from a final judgment for:

> . . . *newly discovered* evidence which by due diligence *could not have been discovered* in time to move for a new trial. . . . (Emphasis supplied.)

[1-3] Was appellant's evidence "new" or "newly discovered?" There can be no Rule 60(b)(2) relief for evidence which has come into existence after the trial is over simply because such a procedure would allow all trials perpetual life. "Newly discovered evidence" means evidence in existence at the time of trial of which the movant was unaware. *Prostrollo v. Univ. of S. Dak.*, 63 F.R.D. 9 (D.C.S.D. 1974). And for a litigant to obtain a new trial on the ground of newly discovered evidence, it must appear that his reasonable diligence before trial would not have revealed this evidence which he failed to discover. *Plisco v. Union Ry. Co.*, 379 F.2d 15, 16 (CCA 3rd 1967). Hence the trial court did not abuse its discretion in denying Moody's motion since this evidence was not even created until after October 18, 1974, over four months after the decree ordering liquidation and approving the reinsurance treaty. Any attempt by Moody to explain away his unawareness would have been inapt in those circumstances.

[4, 5] Appellee contends that Moody's assertion of discrimination against the policyholders fails because Moody did not raise this issue properly in the trial court, that is, that discrimination was raised for the first time in Moody's objections to the trial

court's decree authorizing execution of the agreement to effectuate the reinsurance treaty, issued on April 10, 1975, almost a year after the trial court had approved the reinsurance agreement. This position overlooks the fact that the trial court, trying the case under equity rules, expressly gave the parties a standing objection to "every bit of evidence" and "to every ruling." In this posture we consider that the objection was timely made. Next, the appellee maintains that the trial court was not required to allow the objection of discrimination because Moody himself was found by the trial court to be in open contempt for violating the injunction referred to in 295 Ala. 299, 329 So.2d 73, 10 ABR 543, 546-554 (1976). While it may be true as a general proposition that "[a] party in contempt is not entitled to insist upon a hearing or trial of the case out of which the contempt arose until he first purges himself of the contempt," *Wilkinson v. McCall*, 247 Ala. 225, 23 So.2d 577 (1945), nevertheless for due process reasons "[t]he power to deny a hearing to a person in contempt does not include the power to refuse to such person in contempt the right to defend in the main case on the merits." *McCollum v. Birmingham Post Co.*, 259 Ala. 88, 65 So.2d 689 (1953). By objecting to discrimination against policyholders, Moody appears to have been doing just that, defending such interest as he claims in the main case on the merits of the reinsurance agreement.

Appellees assert further that Moody has no standing to complain of the trial court's approval of the reinsurance agreement. On the other hand, Moody contends that his position as the largest single stockholder of Empire, and as a creditor of Empire, gave him the standing to challenge the agreement which, he contends, "deprives stockholders of their entire equity without providing them with any benefits in return . . . and which deprives creditors of their contractual rights with Empire."

[6, 7] Of course Moody must have some direct interest in the wrongs he alleges, otherwise he has no standing to complain. *Cf. Peterson v. Hamilton*, 286 Ala. 49, 237 So.2d 100 (1970); *U. S. v. 936.71 Acres of Land*, 418 F.2d 551 (CCA 5th 1969). The record does not reveal that prior to this appeal Moody has ever claimed to be a policyholder of Empire. His claim to be a creditor is based upon a debenture bond which, he asserts, he received from Empire and which is alluded to as part of an exhibit introduced at the 1972 hearing, and a guaranty of indebtedness of Credit Factoring, Inc. made by Empire to W. L. Moody and Company, Bankers, of which Moody contends he is sole owner. But Moody never did plead his interest as a creditor prior to the April, 1974 hearing when liquidation of Empire was ordered and approval of the reinsurance agreement was granted by the trial court, and it is now too late to bring to the trial court's attention any such claimed interest. Had he properly asserted this standing, nevertheless the reinsurance agreement does not appear discriminatory. The policyholders, some forty thousand in number, result in part from acquisitions and mergers of many insurance companies with Empire, and they represent many different insurance plans. The reinsurance plan contains provisions which accommodate the various policy distinctions. To be sure, all of the policies are not alike, and the law does not require that they be treated alike. Different classifications based upon substantial differences are not unlawful discrimination. *State v. Pure Oil Co.*, 256 Ala. 534, 55 So.2d 843 (1951); *Carpenter v. Pac. Mut. Life Ins. Co.*, 10 Cal.2d 307, 74 P.2d 761 (1937); affirmed *Neblett v. Carpenter*, 305 U.S. 297, 59 S.Ct. 170, 83 L.Ed. 182 (1938).

Approximately one-half of the Empire policyholders reside in Texas, and most of Empire's physical assets are located in that state. From an order issued by the 53rd Judicial District Court of Texas ordering the Texas ancillary receiver to cooperate in the execution of the reinsurance agreement, Moody appealed to the Court of Civil Appeals of Texas, claiming unlawful discrimination among Empire's policyholders and creditors. Citing the voluminous testimony relating to the fairness of the agree-

ment and the special provisions formulated to produce equitable benefits for each group, that court found no discrimination. We agree. Indeed, it is difficult to imagine any other course, since the policyholders before and after the agreement, had only the right to file a claim against the receiver of the insolvent company for the amount of the cash value of the policies. *Carpenter v. Pac. Mut. Life Ins. Co., supra.* See also *Fletcher v. Tuscaloosa Fed. Sav. & Loan,* 294 Ala. 173, 314 So.2d 51 (1975).

[8] The record in this case reveals that Empire Life Insurance Company of America was in precarious financial condition some three years before it was placed in receivership. A panel composed of the insurance commissioners of five states attempted to effect rehabilitation without receivership, and although some improvement resulted, an examination conducted by the insurance departments of Texas, Alabama and South Dakota found Empire insolvent in excess of six million dollars and impaired in excess of ten million dollars. It was then that formal receivership proceedings were commenced and the then commissioner of insurance of Alabama was appointed receiver. Because of the six million dollar insolvency, the trial court restricted payments of cash values of policies to fifty percent when voluntarily withdrawn prior to death. Moody did not contest the finding of insolvency and made no appeal from the trial court's ruling of June 29, 1972. Apparently Moody accepted the insolvency finding because when the receiver obtained approval from the lower court to solicit reinsurance proposals, Moody was one of those who submitted plans for the rehabilitation of the company. Moreover, Moody made no issue of Empire's insolvency during the lengthy hearing in April, 1974 when the issue of rehabilitation or reinsurance was aired. Accordingly, Moody's attempts to raise that issue on this appeal must also fail. *Dennis v. Hines,* 262 Ala. 541, 80 So.2d 616 (1955).

The record reveals more than ample evidence upon which the trial court could have determined that further efforts at

rehabilitation would be useless, and that reinsurance was necessary to prevent loss of all policyholder benefits to them. The Protective Life Insurance Company was one of those tendering a reinsurance agreement, and there is evidence in the record of a comparative analysis establishing it as the better of those proposed. Protective's plan guaranteed payment of all death benefits, as well as all other maturity benefits, on all Empire policies. It also provided for full payment of all cash benefits accruing after September 15, 1972. This would guarantee to all policyholders who continued to pay premiums their full policy benefits which would be attributable to their current premiums, *i.e.*, cash surrender value, loan value, etc. It provided for a limitation on those cash benefits which policyholders could exercise voluntarily, simply because Empire's assets were worth much less than the reserve liabilities which Protective would assume. The effect of the "moratorium," thirty-five percent, later increased by the trial court to fifty percent because of the expense of defending Moody's numerous lawsuits, would be to reduce the reserves Protective would have to establish. However, Protective agreed to a ten-year limit upon the moratorium, thus providing full policy benefits at the end of ten years to policyholders accepting the plan. In executing its plan, Protective agreed to place with the receiver an amount of assets equal to the reserve liability of every policy of those policyholders rejecting the plan, less the moratorium amount. Because such a payment by Protective represented the value of the agreement to accepting policyholders as well, both classes of policyholders, those accepting and those rejecting, were treated equally. Protective further agreed to make an annual calculation of the ratio of Empire's assets to its reserve liabilities and to reduce the amount of the moratorium as that ratio improves. Also, Protective agreed to receive no profit until this moratorium is eliminated and all policyholders' benefits are restored to accepting policyholders. Any profits to be added to Empire's assets.

Non-policyholders creditors whose claims were not assumed by Protective were provided for by having the receiver retain

from the assets of Empire a two million dollar fund for the payment of their claims. This fund was specified in the advertisements for reinsurance bids, and the evidence is uncontroverted that it is sufficient for the equitable payment of such claims.

[9] Under the facts of this case we cannot state that the trial court abused its discretion by ordering liquidation and reinsurance. The commissioner of insurance has followed the applicable statutory procedures of Title 28A, Alabama Code, relative to these delinquency proceedings, and the evidence adduced sufficiently established insolvency in the first instance, the necessity for liquidation, and a fair and equitable reinsurance plan thereafter. The findings and conclusions of the trial court are due to be affirmed. *Stephens v. Stephens*, 280 Ala. 312, 193 So.2d 755 (1966); *First Nat. Bank of Birmingham v. Brown*, 287 Ala. 240, 251 So.2d 204 (1971).

AFFIRMED.

TORBERT,[1] C. J. and MADDOX, FAULKNER and SHORES, JJ., concur.

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[1] Chief Justice TORBERT was not a member of the Court at the time this case was orally argued. However, he has carefully listened to the tape recordings of oral argument and studied the briefs. Code of Alabama, Tit. 13, § 7; *Alonzo v. State ex rel. Booth*, 283 Ala. 607, 219 So.2d 858.

APPENDIX B

Shearn Moody, Jr.

v.

State of Alabama ex rel. Charles H. Payne,
Commissioner of Insurance, etc.

SC 1269

Supreme Court of Alabama

Feb. 27, 1976

• • • • • • • •

MERRILL, Justice.

[1] This case is concerned with the propriety of the issuance of an injunction whereby Shearn Moody, Jr. was enjoined from interfering with the receivership proceedings of Empire Life Insurance Company of America [hereinafter Empire], an Alabama corporation. Some background information is necessary to place the instant case in proper perspective.

Our records reveal that the State of Alabama, in April, 1972, filed a complaint in the Circuit Court of Jefferson County against Empire requesting that the company be placed in receivership because it was impaired and insolvent. Thereafter, following a hearing before Judge William C. Barber, Empire was placed in receivership by an order dated June 29, 1972, and John G. Bookout, the Commissioner of Insurance for the State of Alabama, was named receiver. Bookout was succeeded as commissioner by Charles H. Payne on January 20, 1975. Empire was also placed in receivership in the States of Arkansas, Mon-

tana and Texas with ancillary receivers appointed in those states. No appeal was taken by Empire or any of its officers from the decision placing it in receivership.

In May, 1973, the receiver petitioned the receivership court for instructions on seeking approval of the various federal and state regulatory agencies for possible advertisement for bids for complete reinsurance of the business of Empire to protect the policyholders. This order was granted. Following the approval of the Federal Trade Commission, the Securities Exchange Commission and state regulatory agencies, the receiver, on request of commissioners and receivers of other interested states, filed a petition for instructions regarding reinsurance, asking the circuit court to enter an order permitting the receiver to advertise for and secure bids for the complete reinsurance of all of the business of Empire. This order was granted.

Following advertisement in various media, bids were taken in compliance with orders of the court. Bids were submitted by Protective Life Insurance Company [hereinafter Protective] and two other life insurance companies in addition to a bid submitted by Shearn Moody, Jr., of Texas, President, Chairman of the Board and principal stockholder of Empire. Another bid was submitted by an individual. Following a hearing of all bidders before the interested commissioners and receivers of the various states, the bid of Protective was recommended to the court in a petition filed in January, 1974, for liquidation and reinsurance without dissolution under provisions of the Alabama Insurance Code, Act No. 407, § 624, Acts of Alabama 1971, p. 996, listed in the Recompilation as Tit. 28A, § 624(2), on the grounds that further effort to rehabilitate the company would be useless.

Moody objected to the reinsurance and liquidation of Empire and was granted the right to intervene.

During the course of the three-week hearing, Protective was also made a party for intervention. Following extensive hearing and briefing by all parties, the trial court, on June 14, 1974, entered an order granting the receiver's petition to liquidate and reinsure the business of Empire into Protective. The trial court found, *inter alia*, that Empire was impaired in excess of ten million dollars, insolvent in excess of six million dollars and that the financial condition of Empire was "rapidly deteriorating."

Intervenor Moody gave notice of appeal, filed a motion for supersedeas bond and motion for new trial. These motions were overruled. The appeal was taken on July 25, 1974; the certificate of appeal was received in this court on August 6, 1974, but the transcript of the record has not yet been received. We avert to this later in the opinion.

I. The Injunction

On December 27, 1974, John G. Bookout, the Commissioner of Insurance for the State of Alabama, applied for and received a temporary restraining order against Moody and others. The order prevented the filing, sponsoring or aiding of any lawsuit or legal claim relating to the affairs of Empire, the treaty of assumption and bulk reinsurance or the decree approving the treaty. To supplement his application, Bookout attached affidavits concerning the multiplicity of litigation instituted by Moody, threats by him to institute further litigation, and the deposition of one Willie Allmon. The hearing was set for January 6, 1975.

Commissioner Bookout testified at the hearing; there was no objection to his testimony, and there was no cross-examination. His testimony is, therefore, uncontroverted and undisputed. He testified that he has been subjected (both as receiver of Empire and individually) to numerous lawsuits and proceedings filed by Moody or Moody lawyers, all of which related to the Empire

receivership and all of which were filed subsequent to the plenary hearing conducted by the receivership court in April, 1974, which culminated in the June 14, 1974 order determining that Empire was insolvent and that reinsurance of the Empire policies was necessary to protect the interests of policyholders. He also testified as to the following separate lawsuits or proceedings filed by Moody or Moody's lawyers and, as to each of them, Bookout testified that said litigation substantially depleted the assets of the receivership estate and, further, resulted in irreparable loss to the receivership in terms of seriously interfering with implementation of the receivership court's orders and supervision of the receivership by Bookout:

A. *Moody v. Empire*, No. 112,034, a suit filed in state court, Galveston County, Texas, in which Moody sought to prevent the transfer of the principal asset of Empire to Protective.

B. *Meyers v. Moody*, C.A. 3-5678-D, a suit pending in federal court, Northern District of Texas, in which Moody filed a cross action against Bookout as receiver of Empire and individually. Moody's cross action alleged mismanagement of the receivership estate by Bookout and alleged that Bookout put Empire in receivership for political reasons. [The issues raised by Moody's cross action had been fully litigated and decided adversely to Moody in the April, 1974 hearing before the Alabama Receivership Court.]

C. Extraordinary proceedings in this court and one federal suit:

(1) In *Ex parte Moody*, S.C. 962, Moody sought that this court approve a supersedeas bond pending his appeal from the June 14 decree; in the alternative, Moody sought the issuance of a writ of mandamus to compel the receivership court to permit supersedeas. All relief sought by Moody was denied.

(2) Moody then filed *Moody v. Bookout*, Civ. No. 74-328-N, in which Moody sought federal district court review of the fore-

going decisions of this court, ostensibly on constitutional grounds. The Federal District Court for the Middle District of Alabama summarily dismissed said action on the grounds that Moody was pursuing the matter in the state courts of Alabama.

(3) Moody nevertheless filed *Moody v. Bookout*, S.C. 1032, in which Moody attempted, for the fourth time, to relitigate the denial of supersedeas in connection with his appeal from the June 14, 1974 decree. This attempt was also rejected by this court.

D. *Allmon v. Bookout*, Civ. No. 74-377-N, was filed in the name of Willie Allmon, an Arkansas policyholder of Empire. This suit alleged that Bookout and Protective caused Allmon to lose 35% of the cash value of his policy. Bookout testified that the records of Empire affirmatively show that the cash-value position of the Allmon policy was unaffected by the receivership of Empire or by the reinsurance of Empire's policies by Protective.

The deposition of Willie Allmon was introduced into evidence at the January 6 hearing upon which this appeal is based, without objection from Moody's counsel. It establishes unequivocally that the Allmon lawsuit was solicited by Moody's agents. The deposition of Allmon, a farmer from Star City, Arkansas, who has only a sixth-grade education, is replete with his sworn testimony that Allmon thought Empire Life Insurance Company was representing him in the federal suit; that Allmon mistakenly believed he was represented by Empire lawyers; that maintenance of the suit was not costing Allmon any money; and that neither Bookout nor Protective had ever done anything to damage or injure Allmon.

The deposition of Ernest Cross, the insurance agent who sold Willie Allmon his Empire policy, was received into evidence, over the objection of Moody's lawyer. Cross's deposition establishes that Cross believed that Dale Major, an out-of-state

Moody attorney named in the January 6 injunction, was an attorney with and legal adviser for Empire; that Major procured from Cross the name and residence of Allmon; and that Major represented himself to Allmon as an Empire attorney.

E. *State of Texas v. Empire*, No. 198-374, is the ancillary receivership proceeding pending in the District Court of Travis County, Texas, in which Empire's ancillary receiver for the State of Texas sought the approval of the Texas ancillary receivership court to consummate the re-insurance agreement whereby Protective assumed the policies of Empire.

After listing the various suits, Bookout testified to Moody's threats. He said:

> "[Shearn Moody] said to me, in words to this effect, that Mr. Bookout, we are just getting started on you.
>
> "I intend to sue you personally. My actions will be of a personal nature against you to carry over after you have left the office [of Commissioner of Insurance]. * * * we killed Crawford Martin and somebody else, * * * he died with a heart attack the day atfer he signed his deposition, and we are beginning on you, and we are going to keep on if it takes us 50 years."

After the close of the evidence and argument of counsel, the injunction was made permanent. In his opinion, Judge Barber stated in part:

> "The order that was issued temporarily by this Court, does enjoin the filing of other suits and other motions in this case, but there is a stipulation in the order that these should not be filed without the permission of the Court.
>
> * * * * * * * *
>
> "* * * I think that this court would have a right to refuse the proposed litigation with an eye to see whether or not it is a matter of harassment, a matter which would

> obstruct the orderly carrying out of the previous decrees and orders of this court by the Receiver emanating from the lengthy hearing that was held last spring here in this court.
>
> * * * * * * * *
>
> "It is a feeling of this Court that based upon the evidence that has been introduced at this hearing and through the depositions that have been presented to me, that there is a very evident effort at delay and harassment on the part of Shearn Moody in his activities in this case.
>
> * * * * * * * *
>
> "There has been no evidence to controvert the statement that has been made by Mr. Bookout in his testimony. There has been no evidence to controvert the statement[s] made in the depositions that have been presented, which is the basis of my ruling in this case."

The court concluded:

> "It is ORDERED, ADJUDGED and DECREED that
>
> (1) any and all policyholders, stockholders and agents, present or former, of Empire Life Insurance Company of America, and
>
> (2) Shearn Moody, Jr., his officers, agents, servants, employees and attorneys (including, but without limitation, Donald L. Collins, A. Eric Johnston, Dale R. Major, Scott E. Manley, A. R. Schwartz, and Thomas R. Beech),

and those persons in active concert or participation with any of the foregoing be permanently restrained and enjoined from filing, financing, sponsoring, initiating, or aiding, in whole or in part, in any way the filing of any lawsuit, complaint or legal claim, or any amendment to any complaint or legal claim in any court wheresoever located on behalf of any party whatsoever against:

(1) John G. Bookout, as an individual;

(2) John G. Bookout as Receiver of Empire Life Insurance Company of America, his officers, agents, employees and attorneys;

(3) the Ancillary Receivers of Empire Life Insurance Company of America, their officers, agents, employees and attorneys;

(4) Protective Life Insurance Company, its officers, agents, employees and attorneys; or

(5) any other person or legal entity which lawsuit or claim relates to or affects directly or indirectly:

(a) the affairs of Empire Life Insurance Company of America;

(b) its receivership;

(c) its Receiver;

(d) the Treaty of Assumption and Bulk Reinsurance, as amended, between the Receiver and Protective Life Insurance Company; or

(e) the implementation of any order or decree of this Court in this proceeding,

unless such policyholders, stockholders or agents or said Shearn Mooody, Jr., his officers, agents, servants, employees and attorneys and those persons in active concert or participation with them shall first receive the prior approval of this Court."

Title 28A, § 624(2), provides in Chapter 28, Rehabilitations and Liquidations, as follows:

"(2) The court may at any time during a proceeding under this chapter issue such other injunctions or orders

as may be deemed necessary to prevent interference with the commissioner or the proceeding, or waste of the assets of the insurer, or the commencement or prosecution of any actions, or the obtaining of preferences, judgments, attachments or other liens, or the making of any levy against the insurer or against its assets or any part thereof."

The injunction is well within the statutory authorization, and the undisputed evidence, both oral and documentary, clearly supported the issuance of the injunction.

The requirement that parties who desire to bring suit against a receiver must first obtain permission from the receivership court is not new in Alabama. In *Ex parte Davis*, 230 Ala. 668, 162 So. 306 (1935), this court said:

"* * * 'Property in the hands of a receiver being in the custody of the court, the broad general rule established by the weight of authority is that a receiver appointed by judicial authority cannot, in the absence of a statute to the contrary, be subjected to suit without leave of the court appointing him.' * * * 'A receiver being an officer of the court, acting under its direction, and in all things subject to its authority, it is contrary to the established doctrine of courts of equity to permit them to be made a party defendant to litigation, unless by consent of the court appointing him. And it is in all cases necessary that a person desiring to bring suit against a receiver in his official capacity, should first obtain leave of the court by which he was appointed, since the courts will not permit the possession of the receiver to be disturbed by suit or otherwise, without its consent or permission. The rule is established for the protection of receivers against unnecessary and expensive litigation, and in most instances a party aggrieved may have ample relief by application on motion to the court appointing the receiver. And

when an action is instituted against a receiver in his official capacity, without first obtaining leave of the court, the plaintiff in such action is guilty of a contempt of court and will be punished accordingly.'

"This court is firmly committed to the above rule. *Montgomery, Trustee v. Enslen, Receiver,* 126 Ala. 654, 28 So. 626; *Baker v. Carraway,* 133 Ala. 502, 31 So. 933."

The rationale for requiring permission of the receivership court is to permit that court the opportunity to satisfy itself that the suit or legal proceeding which is planned will not unduly interfere with the receiver or the receivership proceedings.

[2] The mere fact that the injunction was made permanent does not, in an injunction as issued in the instant case, mean that such injunctions do not remain subject to clarification and modification by the trial court. In *Ex parte Myers,* 246 Ala. 460, 21 So.2d 113 (1945), this court said:

"* * * the court which has rendered a final decree in the form of a permanent or perpetual injunction in respect to future activities may open and modify it where the circumstances and situation of the parties are shown to have so changed as to make it just and equitable to do so. * * *"

This court quoted, with approval, from *Sontag Chain Stores Co. v. Superior Court,* 18 Cal.2d 92, 113 P.2d 689, 690, as follows:

"* * * 'this is so because the decree, although purporting on its face to be permanent, is in essence of an executory or continuing nature, creating no right but merely assuming to protect a right from unlawful and injurious interference. Such a decree, it has uniformly been held, is always subject, upon proper showing, to modification or dissolution by the court which rendered it. The court's power in this respect is an inherent one.' * * *"

The record shows no request by Moody to file a suit against the receiver or any request to the trial court for clarification or modification.

[3] Appellant Moody argues in brief that the injunction was overbroad. But the record does not show that that question was raised in the court below.

[4] The trial court will not be put in error unless the matter complained about was called to its attention by objection or by other appropriate method. *Colburn v. Mid-State Homes, Inc.,* 289 Ala. 255, 266 So.2d 865; *Pearce v. Brilliant Coal Co.,* 200 Ala. 630, 77 So. 4.

"The general rule is that the appellate court, on review of injunction orders and decrees, will consider only such questions as are raised in the court below, and properly preserved and presented. Where that is not done, the court may refuse to consider an objection * * * that the injunction is too broad in its operation, * * *." 42 Am.Jur.2d, Injunctions, § 350, p. 1158.

The injunction was not only justified but was necessary to preserve the assets of Empire.

II. Object of Ancillary Suits Filed by Moody

The principal asset of Empire was the Libbie Shearn Moody Trust. In *Moody v. Bookout,* Middle District of Alabama, Case No. 74-377-N, Moody's prayer for relief asked that the receiver and Protective Life Insurance Company be restrained from in any way disposing of any of Empire's assets until a final decision on appeal in the Supreme Court of Alabama; and that these defendants be enjoined from the execution and carrying out the order of Judge Barber dated June 14, 1974.

In *Moody v. Moody National Bank and Empire Life Insurance Company* in State District Court, Galveston, Texas, Case

No. 112,034, Moody's prayer for relief asked that the court reform the terms of the agreement whereby Empire acquired Moody's interest in the Libbie Shearn Moody Trust "to conform with the intent of the parties and to expressly provide that neither Empire nor any one acting for it may assign such interest in the Libbie Shearn Moody Trust; * * *."

It is evident that the extraordinary hearings in this court, S.C. 1125, January 22, 1975; S.C. 1221, April 23, 1975; S.C. 1200, March 26, 1975 and November 11, 1975, were either directly or indirectly attempts by Moody to nullify the action of the trial court on June 14, 1974, or to get the possession of the Libbie Shearn Moody Trust out of the receivership and back into Moody's possession.

This court has consistently refused to grant Moody the relief sought and, insofar as we are informed, no other jurisdiction, either state or federal court to which he has applied, has granted him any such relief.

III. The Donovan Case

[5] Most of appellant's brief and most of his oral argument were devoted to the proposition stated in *Donovan v. City of Dallas*, 377 U.S. 408, 84 S.Ct. 1579, 12 L.Ed.2d 409 (1964), that "state courts are completely without power to restrain federal-court proceedings in *in personam* actions." This principle is not new to us. *Donovan* was cited and applied by this court in *Johnson v. Brown-Service Ins. Co.*, 293 Ala. 549, 307 So. 2d 518 (1974). [We agree that it states the law and based on the briefs, counsel for all parties agree that it is the law.]

Moody made this argument in trying to show that the filing of the case of *Allmon v. Bookout* was not in violation of the injunction issued by Judge Barber.

It is interesting to note that the same paragraph in which the previous quote appears begins with some careful writing and limitation by Justice Black, the author of the opinion:

> "Early in the history of our country a general rule was established that state and federal courts would not interfere with or try to restrain each other's proceedings. That rule has continued substantially unchanged to this time. An exception has been made in cases where a court has custody of property, that is, proceedings *in rem* or *quasi in rem*. In such cases this Court had said that the state or federal court having custody of such property has exclusive jurisdiction to proceed. *Princess Lida v. Thompson*, 305 U.S. 456, 465-468, 59 S.Ct. 275, 280, 281, 83 L.Ed. 285 [291]. In Princess Lida this Court said 'where the judgment sought is strictly in personam, both the state court and the federal court, having concurrent jurisdiction, may proceed with the litigation at least until judgment is obtained in one of them which may be set up as res judicata in the other.' Id., 305 U.S. at 466, 59 S.Ct. at [280] [83 L.Ed.2d 291]. See also *Kline v. Burke Construction Co.*, 260 U.S. 226, 43 S.Ct. 79, 67 L.Ed. 226. * * *"

We have already shown that these suits were repeated attempts to remove assets from the *res* of the receivership and liquidation proceedings. The federal courts have consistently followed the rule that proceedings involving the liquidation of the business and assets of an insurance corporation are *in rem* or *quasi in rem* proceedings. *Penn General Casualty Co. v. Pennsylvania*, 294 U.S. 189, 194-95, 55 S.Ct. 386, 388, 79 L.Ed. 850, 854-55; *Jacobs v. DeShetter*, 465 F.2d 840 (6th Cir.); *Gillis v. Keystone Mut. Casualty Co.*, 172 F.2d 826, 829 (6th Cir.), cert. denied, 338 U.S. 822, 70 S.Ct. 67, 94 L.Ed. 499; *Holley v. General American Life Ins. Co.*, 101 F.2d 172 (8th Cir.), cert. denied, 307 U.S. 615, 59 S.Ct. 1038, 83 L.Ed. 1496; *Liberty National Ins. Co. v. Reinsur-*

ance Agency, Inc., 307 F.2d 164, 168 (9th Cir.); *Hutchins v. Pacific Mut. Life Ins. Co.*, 20 F.Supp. 150, 152 (S.D. Cal.), aff'd 97 F.2d 58, 60 (9th Cir.).

[6] This same question was raised in *Allmon v. Bookout*, Middle District of Alabama, No. 74-377-N. In his opinion, filed April 24, 1975, Judge Varner discussed *Hutchins*, supra, and we quote his statements with approval:

> "It appears to be the settled rule with respect to suits in equity for the control by receivership of the assets of an insolvent corporation that the Court first assuming jurisdiction may maintain and continue to exercise that jurisdiction to the exclusion of any other court. (Citations omitted.)
>
> "This jurisdictional priority principle is buttressed by the case of *Hutchins v. Pacific Mutual Life Ins. Co.*, 20 F.Supp. 150 (S.D. Cal. 1937), affm'd 97 F.2d 58 (9th Cir. 1938). In that case prior to any suit being filed in federal court, the State Court vested title of all the assets of an alleged insolvent domestic insurance company in the Insurance Commissioner of California pursuant to his petition. After the State Court—again pursuant to the Commissioner's petition—approved liquidation of the insolvent company on the grounds that conservation was futile, the Commissioner filed a plan of reorganization whereby a new insurance company was to acquire the assets of the insolvent company. The plan, after approval by the State Court, was fully executed.
>
> "Subsequently, suit was brought in federal court seeking reconveyance of the assets on the grounds that the entire State proceeding was fraudulent and, therefore, that the State Court lacked jurisdiction. The District Court, in dismissing the federal action, stated:
>
> " 'This action, and the one in the state courts, are actions in rem, or, at least, quasi in rem. The relief sought is primarily concerned with the assets in question. The rule in such cases is that the court first acquiring jurisdiction of the res has exclusive jurisdiction.' 20 F.Supp. at 152."

One John S. Bleker, Jr. was granted to intervene as a plaintiff with Allmon. Motion for summary judgment for defendants was granted.

[7] We are convinced that Judge Barber did not violate either the letter or the spirit of *Donovan*.

IV. The Allmon Case—*Allmon v. Bookout*, No. 74-377-N.

We have already referred to this case and pointed out that although it was brought in Allmon's name, he was merely an unwitting front for Moody. We were told on oral argument that after appeal had been taken to the Fifth Circuit, Allmon cancelled his policy and dropped out of the case and that on November 18, 1975, the Fifth Circuit vacated the appeal and remanded the cause to the district court for appropriate findings of fact and conclusions of law as to whether the appeal had been mooted

It is appropriate to show that the prayer for relief in the original bill in *Allmon* asked that the defendants be enjoined from consummating the reinsurance agreement; that Bookout be enjoined from action which might affect Allmon's rights as policyholder or creditor; and in the alternative, joint and several damages of $40,000,000. Once again, Moody was attempting to stop the liquidation and to regain possession of the principal assets of Empire. The mere fact that in the alternative he prayed for damages does not change the main thrust of the suit from an attempt to secure possession of the assets of Empire.

[8] Counsel mention in briefs an amendment to the complaint in the Allmon case. The amendment is not in the tran-

script before us and, being *de hors* the record, cannot be considered. *Coleman v. Estes*, 281 Ala. 234, 201 So.2d 391; *Blanton v. Blanton*, 276 Ala. 681, 166 So.2d 409; *Cooper v. Adams*, Ala., 322 So.2d 706.

V. The Appeal in the Original Case.

Earlier in the opinion, we stated that the notice of appeal from the June 14, 1974 order in the original case was taken on July 25, 1974, but had never been perfected. This fact is no part of the instant appeal on the injunction question, but we feel constrained to comment on it.

The appeal in the original case should settle most of the questions in this litigation, but Moody has evidently sought to try his case in this court piecemeal in a succession of requests for extraordinary writs. The suits in other jurisdictions previously listed were also filed after the appeal was taken. At an extraordinary hearing on January 22, 1975, a member of this court asked counsel for Moody when the transcript of the record of the appeal on the original case would be filed in this court. The answer was that it should be here in about thirty days. Later, at an extraordinary hearing in April, 1975, new counsel represented Moody and the question was asked when the transcript could be expected and the same reply "in about thirty days" was given. We considered then and still consider that the answer given by counsel on both occasions were made in good faith. Counsel answering the second time withdrew from the case soon thereafter.

In August, 1975, motions to dismiss the appeal were filed but the motions were denied. One of the reasons for the denial was that nowhere was there any writing by this court that attempted to list the harassing and delaying tactics employed by Moody. We have not listed all of them here but we have tried

to mention most of them. We did not want to put him in a position to go to some other jurisdiction, either state or federal, with the complaint that this court had denied him an appeal by dismissing his appeal in the most important of all suits.

But now, in this opinion, we have tried to give a sufficient account of the many maneuvers that have taken place in this litigation, and a sufficient compilation of events to counter any claim of summary denial of Moody's rights to be heard and to have his appeal decided.

We do not intend to be as lenient in the future as we have been in the past, regardless of the changes in counsel. The record in the original case must be filed within a reasonable time of the publication of this opinion.

The order and injunction issued by Judge Barber, dated January 6, 1975, is due to be, and is, affirmed.

AFFIRMED.

HEFLIN, C. J., and MADDOX, JONES and SHORES, JJ., concur.

APPENDIX C

In the Circuit Court for the Tenth Judicial Circuit of Alabama, Equity Division

State of Alabama, ex rel. John G. Bookout, Commissioner of Insurance,
Plaintiff,
vs.
Empire Life Insurance Company of America, an Alabama Corporation,
Defendant,
and
Shearn Moody, Jr.,
Intervenor.

Civil Action No. 171-687.

Order

This Court is in receipt of an order issued by the Supreme Court of Alabama, addressed to the undersigned, as Judge of the Tenth Judicial Circuit of Alabama on April 23, 1975, directing the undersigned to show cause why the undersigned should not specify in some detail what is required of Shearn Moody, Jr. to purge himself of contempt of court. As a result of said show cause order, this Court enters the following findings, conclusions, order and decree:

1. On January 6, 1975, the undersigned, as Judge of the Tenth Judicial Circuit of Alabama, issued an injunction in this cause, which injunction this Court is expressly authorized to issue by Alabama statute. Title 28A, § 624 *Code of Alabama* 1940, as amended, provides that the Court in a receivership proceeding for an insurance company may, if deemed necessary by the

Court, issue injunctions to prevent interference with the receiver, or the receivership proceedings, or the receivership assets. The statute also expressly authorizes the receivership Court to enjoin the commencement or prosecution of legal actions.

2. The injunction issued by this Court on January 6, 1975, enjoined Shearn Moody, Jr. (his officers, agents, servants, employees and attorneys) and others, from filing any lawsuit, complaint or legal claim, or any amendment to a complaint or legal claim, which lawsuit, claim or amendment relates to the receivership of Empire Life Insurance Company of America ("Empire") or the implementation of any order or decree of this Court in connection with said receivership, without the prior approval of this Court.

3. At all times material to this action, Shearn Moody, Jr., an intervenor in this action, has had full and actual knowledge of the entry of the Court's injunction of January 6, 1975, and of the terms of said injunction.

4. On February 3, 1975, this Court ordered Moody (and others) to appear before the Court on February 18, 1975, and to show cause why he should not be adjudged in civil contempt because of failure to obey and comply with the provisions and terms of the Court's injunction of January 6, 1975. Said show cause order was mailed by this Court to Moody personally by certified mail.

5. By order of this Court duly entered herein on February 18, 1975, in compliance with the request of the Supreme Court of Alabama, the hearing on the show cause order addressed to Moody, and the hearing on other, similar, show cause orders which had been directed by this Court to various agents and attorneys of Moody, was continued until March 10, 1975. Notice of said continuance was duly mailed by this Court to all interested persons, including Moody.

6. On March 10, 1975, at the time and place specified, Moody failed to appear. Two attorneys, who then appeared as counsel of record for Moody, Donald L. Collins and A. Eric Johnston, duly appeared in response to the Court's show cause orders which had been directed to them, but made such appearance only in their individual capacities.

7. The records of this Court indicate that the show cause order that was directed to Moody and duly served upon him by registered mail properly addressed and mailed to him by this Court, was returned to this Court "unclaimed."

8. The motion of Intervenor, Protective Life Insurance Company, for judgments of civil contempt against Moody, and several of Moody's attorneys and agents, was heard before this Court, is indicated above, on March 10, 1975. Upon consideration of the motion and supporting papers, voluminous documentary evidence, oral testimony, and argument of counsel, the Court determined that there exists clear and convincing, uncontested, evidence that:

(a) Moody had full and actual knowledge of the Court's order that Moody appear and show cause why he should not be adjudged in civil contempt for violation of the Court's injunction of January 6, 1975; and that Moody had full and actual knowledge of the pendency of the proceedings on said show cause order on March 10, 1975.

(b) Moody aided, assisted, and participated in the filing of an amended complaint in that certain case then pending in the United States District Court for the Middle District of Alabama, Northern Division, being Case No. 74-377-N, styled as follows: WILLIE ALLMON v. JOHN G. BOOKOUT, ET AL. [hereinafter *Allmon* case]. Said amended complaint was filed on or about November 22, 1974. The Court is advised that the *Allmon* case has been dismissed and is presently pending on appeal to the United States Court of Appeals for the Fifth Circuit.

(c) The amended complaint in *Allmon* calls into question, in aggravated form, all the proceedings had in this Court in connection with the receivership of Empire. The relief sought by the amended complaint includes a demand for judgment by the federal court

> "restraining and preventing defendants [including the Commissioner of Insurance of Alabama, the duly appointed Receiver of Empire], their agents, servants and employees, and all other persons who receive actual notice . . . from liquidating Empire and from enforcing the Treaty of Assumption and Bulk Reinsurance . . . from taking any further steps to consummate said Treaty . . . and from enforcing or carrying out any order, judgment, or decree entered in the Circuit [Court] for the 10th Judicial Circuit of Alabama in Case No. 171-687 . . ."

Amended Complaint at pp. 20-21. The relief sought by the Amended Complaint also includes a demand that the federal court declare

> "that any action taken in the aforesaid case captioned *Alabama ex rel. Bookout v. Empire* is null and void."

Amended Complaint at p. 21.

(d) The approval of this Court was neither sought nor obtained prior to the filing of the aforesaid Amended Complaint.

(e) This Court's Receiver has been subjected to numerous lawsuits in connection with the receivership of Empire; these lawsuits have been filed and prosecuted by Moody, and his attorneys; and these lawsuits have greatly hampered and interfered with the receivership and the implementation of the orders and decrees of this Court relating to the receivership.

(f) Moody has threatened to sue the Receiver, and has threatened to continue to bring such lawsuits against the Receiver for a period of a great number of years. Moreover, Moody has threatened to pursue, by one lawsuit after another, the former Receiver, Judge John G. Bookout, in his individual capacity, until Judge Bookout's death.

(g The *Allmon* lawsuit was openly and flagrantly solicited by Dale R. Major, an attorney of record for Moody, which attorney misrepresented himself to the named plaintiff in the *Allmon* case as an attorney for Empire Life Insurance Company of America rather than for Moody. At the time the *Allmon* complaint was filed against the Receiver and Protective Life Insurance Company, Allmon had never heard of the Receiver or Protective and knew of nothing that either had done to injure him.

(h) After the filing of the *Allmon* lawsuit, which had been solicited by Moody's attorney, another Moody attorney appearing for the plaintiff in the *Allmon* case, Donald L. Collins, on several occasions contacted an ex-employee of the Alabama Insurance Department, Charles E. Hunter, and, in connection with the *Allmon* lawsuit, told Mr. Hunter that Moody was pressuring Collins to take Hunter's deposition in the *Allmon* case.

(i) The lawyers who appear as attorneys of record in the *Allmon* case are attorneys in fact for Moody. The filing of the *Allmon* Amended Complaint was the subject of a conference in Texas attended by Moody and numerous lawyers, which conference was conducted after this Court had entered its preliminary injunction which was incorporated in the permanent injunctive order of January 6, 1975.

(j) No lawyer who purports to be an attorney of record for Allmon discussed the filing of the *Allmon* Amended Complaint with Allmon.

(k) The affidavit of service which accompanies the *Allmon* complaint as amended shows on its face that it was executed in Galveston County, Texas, which this Court knows to be the residence of Moody.

(l) The *Allmon* complaint as amended was filed only by Moody lawyers, all of whom are named in this Court's injunction of January 6, 1975, after the Supreme Court of Alabama had denied a "Petition for a Writ of Mandamus and Writ of Prohibition or Other Remedial Writ" which was brought before the Supreme Court of Alabama on behalf of Shearn Moody, Jr. and others, by Donald L. Collins. The Moody lawyers who filed the Amended Complaint reside in Indiana, Texas and Alabama. Allmon resides in Star City, Arkansas and had never heard of any of the Moody attorneys until solicited for the filing of the *Allmon* suit.

(m) The filing of the *Allmon* complaint as amended was initiated, sponsored, and aided by Moody, in conjunction with his officers, agents, servants, employees, and attorneys (including Dale R. Major, Donald L. Collins, A. Eric Johnston, and Scott E. Manley, among others).

(n) The filing and prosecution of the *Allmon* case has directly and adversely affected the affairs of Empire, its receivership, its Receiver, and the implementation of the orders and decrees of this Court.

(o) Moody has knowingly and willfully disobeyed and ignored the provisions of the injunction of this Court of January 6, 1975.

(p) By reason of the disobedience and refusal of Moody to comply with the provisions of said injunction, the Receiver, the receivership estate, the Intervenor, Protective Life Insurance Company, and others have suffered substantial damages.

ACCORDINGLY, having made and entered its findings and conclusions, it is

ORDERED, ADJUDGED, and DECREED:

1. That Shearn Moody, Jr. is in civil contempt of this Court for having failed and refused to obey its decree of January 6, 1975.

2. That Shearn Moody, Jr. purge himself of contempt by taking the following actions:

(a) Fully comply with all of the provisions of the Court's decree of January 6, 1975.

(b) Appear in person before this Court on May 7, 1975, at 8:00 o'clock, A.M., in Room 223, Jefferson County Courthouse, 710 North 21st Street, in the City of Birmingham, Alabama, and then and there explain to this Court:

(i) the reasons why the registered letter mailed to Moody on or about February 3, 1975 bearing the return address of this Court was not accepted by Moody when delivered to him;

(ii) the reasons why Moody failed to appear before this Court at the proceedings held herein on March 10, 1975;

(c) Take whatever action may be necessary to withdraw or cause to be withdrawn any and all support (financial or otherwise), aid or assistance which the said Shearn Moody, Jr. has provided or continues to provide to any of his agents, servants, employees or attorneys, which support, aid or assistance relates to the filing or the maintenance of that certain case now pending on appeal from the United States District Court for the Middle District of Alabama, Northern Division, being Case No. 74-377-N, styled as follows: *Willie Allmon v. John G. Bookout, etal.*

(d) File with this Court, within ten (10) days after the entry of this Order, a sworn statement setting forth in detail an accounting of all fees paid and other compensation or things of value furnished, since November 1, 1974 by or on behalf of Moody to any of the following persons or firms: Donald L. Collins; A. Eric Johnston; the firm of Collins & Johnston; Dale R. Major; Scott E. Manley; the firm of Saxe, Bacon, Bolen & Manley or any of its members or employees.

(e) Require that each of the foregoing persons or firms or employees immediately furnish to the said Shearn Moody, Jr. sworn statements setting forth in detail:

(i) the amount of any and all fees received by the foregoing persons from Moody or his agents or persons acting in concert with Moody or his agents since November 1, 1974;

(ii) the amount of any and all funds expended by the foregoing persons since November 1, 1974, which funds relate in any way to the *Allmon* lawsuit, the affairs of Empire, its Receiver, or the receivership estate; and

(iii) the exact purpose for which such expenditures were made, identifying with particularity the lawsuit, legal proceeding or other matter to which such expenditures were or are related.

The aforesaid sworn statements shall also itemize with particularity all funds or other compensation advanced by the foregoing persons, firms or employees to any other person or firm in connection with the *Allmon* lawsuit. Upon receipt of said sworn statements by Moody, the same shall be forthwith filed with this Court.

(f) File with this Court within ten (10) days after the entry of this Order a sworn statement setting forth in detail

a record of all meetings and conferences attended by Moody since November 1, 1974 at which the *Allmon* lawsuit or the matters and things alleged in the *Allmon* complaint as amended came under discussion. Said sworn statement shall include the dates and places of any such meeting and conference and the names of all persons present.

(g) Discharge any and all agents, servants, employees, and attorneys presently employed, directly or indirectly, by or on behalf of Moody, whose employment is or has in an way related to the filing or the litigation of the *Allmon* suit, unless it be affirmatively shown under oath that any such person had no knowledge of this Court's injunction of January 6, 1975; and provide this Court with written evidence of each such discharge within ten (10) days of the entry of this order.

(h) Appear in person before this Court on May 12, 1975, at 8:00 o'clock, A.M., in Room 223, Jefferson County Courthouse, 710 North 21st Street in the City of Birmingham, Alabama, and at such further times and places as the Court may direct, and show to the Court that this Order has been fully complied with.

(i) Pay to Protective Life Insurance Company and the Receiver any and all costs and expenses incurred by them as a result of the failure and refusal of Moody to comply with the January 6, 1975 order, including, but not limited to, all costs of the contempt proceeding, including costs of investigation, preparation for and conduct of such proceeding, the costs of defending against the *Allmon* suit, and any and all reasonable attorneys' fees.

(j) Promptly comply with any further orders of this Court relating to this matter.

IT IS FURTHER ORDERED, that Shearn Moody, Jr., be and he hereby is ordered to pay to the Clerk of this Court a

fine of Five Thousand Dollars ($5,000.00) per day, each day, until he shall have purged himself of contempt of this Court; PROVIDED, however, in order that Moody may have an opportunity to demonstrate that he has brought himself into compliance with this Court's injunction of January 6, 1975, said fine shall not be effective until further order of this Court.

IT IS FURTHER ORDERED, that at 10:00 o'clock A.M., on May 19, 1975, this Court shall conduct a hearing to determine the extent and amount of damages sustained by any person or party by reason of the failure and refusal of Shearn Moody, Jr. to comply with the Court's injunction of January 6, 1975.

IT IS FURTHER ORDERED, that this Court's order of March 10, 1975 finding Shearn Moody, Jr. in civil contempt of the January 6, 1975 injunction be and it hereby is VACATED.

DONE this 30th day of April, 1975.

/s/ WM C. BARBE
Circuit Judge

APPENDIX D

In the Circuit Court of
Jefferson County, Alabama
In Equity

State of Alabama, ex rel. John G. Bookout, Commissioner of Insurance, Plaintiff, vs. Empire Life Insurance Company of America, an Alabama corporation, Defendant, and Shearn Moody, Jr., Intervenor.	Civil Action No. 171-687

Order

Pursuant to the terms of that certain Order of this Court dated April 30, 1975, adjudging Shearn Moody, Jr., to be in civil contempt, the Court does hereby *ex mero motu* order and command Shearn Moody, Jr. to appear in person before this Court on July 19, 1976, at 1:30 o'clock p.m., in Room 223, Jefferson County Courthouse, 710 North 21st Street in the City of Birmingham, Alabama, and then and there demonstrate to the Court that the said Shearn Moody, Jr. has purged himself of contempt of this Court and has fully complied with the Order of this Court dated April 30, 1975.

All parties to the above cause are hereby granted leave to adduce such evidence as may be deemed necessary in connec-

tion with the hearing hereby scheduled in the above cause on July 19, 1976.

If the services of a court reporter are desired, please make your arrangements in advance.

DONE this 16th day of June, 1976.

/s/ WM. C. BARBE
Circuit Judge in Equity Sitting

APPENDIX E

In the Circuit Court of Jefferson County
Equity Division

State of Alabama, ex rel. John G. Bookout, Commissioner of Insurance, Plaintiff, vs. Empire Life Insurance Company of America, an Alabama corporation, Defendant, and Shearn Moody, Jr., Intervenor.	Civil Action No. 171-687

Order and Decree

This cause came before the Court for evidentiary hearing on July 19, 1976 pursuant to order of the Court entered June 16, 1976. Having carefully considered the documentary evidence adduced at said hearing, oral testimony of witnesses, and argument of counsel, the Court is of the opinion that the following findings, conclusions, order and decree are due to be and hereby are entered in this cause.

1. By Order entered June 16, 1976, this Court ordered Shearn Moody, Jr., a party to this action, to appear before the Court on July 19, 1976, and then and there demonstrate to the Court that he had purged himself of civil contempt of this Court and had fully complied with the Order of this Court entered

on April 30, 1975, which Order adjudicated Moody in civil contempt based on uncontested evidence, *inter alia*, that

> (a) Moody knowingly and willfully disobeyed and ignored the provisions of an Injunction entered by this Court on January 6, 1975 by sponsoring, aiding, and controlling the filing of an amended complaint in a lawsuit entitled *Willie Allmon, etc. v. John G. Bookout, et al.*, Civil Action No. 74-377-N (U.S. District Court for the Middle District of Alabama), without seeking or obtaining leave of this Court to do so as required by said Injunction.
>
> (b) The filing and prosecution of the *Allmon* case directly and adversely affected the affairs of Empire Life Insurance Company of America ("Empire"), its receivership, its Receiver, and the implementation of the orders and decrees of this Court.

2. On July 19, 1976, at the time and place specified, Moody failed to appear. Three of Moody's attorneys were present, however, and sought to explain Moody's failure to attend. The explanations offered were wholly insufficient to explain Moody's failure to appear. Moody made no effort prior to the July 19, 1976 hearing to seek a continuance, though one of his attorneys did request, during the course of the hearing, the opportunity to present some testimony that he might find appropriate at some later date. The Court denied such request. Moody had ample opportunity prior to said hearing to arrange for the attendance of any witnesses whose testimony he desired and to procure and develop any other evidence he intended to offer. Moody was represented by three attorneys, two of whom, Messrs. Newman and James, this Court knows to be fully knowledgeable concerning all developments in this proceeding.

3. No substantive evidence was offered on behalf of Moody to demonstrate that he had complied with the April 30, 1975

Order or that he had otherwise purged himself of civil contempt of this Court.

4. Having carefully considered voluminous documentary evidence, the testimony of witnesses, and argument of counsel, the Court is of the opinion that there exists clear and convincing, undisputed evidence that

(a) Moody, by and through his attorneys and agents, in flagrant violation of this Court's Orders of January 6, 1975 and April 30, 1975 continued to aid, assist, support and control the prosecution and maintenance of the *Allmon* litigation up until June 1976, at which time said action was ultimately dismissed by the federal district court as moot.

(b) The *Allmon* complaint was prepared by one of Moody's attorneys of record in this case with the active assistance of Moody himself; his house counsel (Scott E. Manley); his administrative assistant (Norman Revie); and a law clerk for Moody's house counsel (Darryl L. J. Fanelli).

(c) The *Allmon* complaint, as amended, was filed by Darryl Fanelli, law clerk to Moody's house counsel, whose legal education is being financed by Moody and his house counsel. The cost of serving the *Allmon* complaint, as amended, was billed to Moody. Alabama attorneys were hired by Moody to handle Empire-related litigation for him in Alabama, including the *Allmon* case, at a retainer of $1500.00 per week.

(d) Moody signed an indemnity agreement purporting to hold certain of his Alabama attorneys harmless from any liability based on violation of the Order and Injunction entered herein on January 6, 1975, which prohibited, *inter alia*, the filing of the amended complaint in *Allmon* without prior approval of this Court.

(e) In April 1975 Moody's house counsel employed Montgomery attorneys to represent Moody in continuing prosecu-

tion of the *Allmon* case. Moody's counsel represented that Moody would take care of all attorneys' fees incurred. The Montgomery attorneys thus employed on behalf of Moody continued to prosecute the *Allmon* action on behalf of Moody after April 1975.

(f) After issuance of the April 30, 1975 Order, Moody's house counsel and other Moody attorneys sought federal court review of said Order by the Fifth Circuit Court of Appeals, in connection with the appeal from the district court's entry of summary judgment in the *Allmon* action. Moody's attorneys also sought injunctive relief from the federal appeals court enjoining implementation of the Order entered by this Court on April 10, 1975. The pleadings and papers filed by Moody's house counsel and other Moody lawyers in connection with the *Allmon* appeal further acknowledged that Moody had employed attorneys to prosecute the *Allmon* action and that the attorneys so employed were due to be discharged under the terms of the April 30, 1975 Order of this Court.

(g) Numerous affidavits executed by Moody's house counsel and other Moody agents in opposition to dismissal of the *Allmon* appeal demonstrate Moody's pervasive control of the *Allmon* appeal and attempts to prevent its dismissal.

(h) Pleadings and affidavits filed in an action brought in federal district court here in Birmingham* by attorneys who had previously represented Moody in these proceedings and in the *Allmon* action bear further witness to Moody's pervasive control of the *Allmon* action. The Court refers specifically to affidavits filed in said action by Moody, Manley, and one of Moody's ex-counsel who testified at the hearing on July 19, 1976.

(i) Moody's counsel, Manley, and Martin Solomon, a New York lawyer representing Moody, continued active involvement

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* *Donald L. Collins, et al., etc. v. Shearn Moody, Jr.*, Civil Action No. 75-L-0484S (United States District Court for the Northern District of Alabama).

in the *Allmon* action after it was remanded to the federal district court in Montgomery until well after the hearing in May 1976, on the basis of which the *Allmon* action was dismissed as moot.

(j) Moody's activities and those of his agents described above, are exacerbated by the fact that the federal district court ultimately determined that Willie Allmon had not been injured or damaged in any way by the reinsurance agreement that was submitted by Protective Life Insurance Company ("Protective") and approved by this Court. It was, of course, the reinsurance agreement and the approval of the same by this Court, that Moody utilized as the ostensible factual basis for the *Allmon* litigation.

(k) Moody's activities and those of his agents described above are further exacerbated by the fact that the federal district court ultimately determined that Willie Allmon had intentionally and voluntarily terminated his status as an Empire policyholder during the pendency of the appeal of the *Allmon* action to the Fifth Circuit Court of Appeals. It was Allmon's status as policyholder, of course, that provided the sole basis for maintenance of the *Allmon* appeal by Moody's lawyers ostensibly in Allmon's name. The opposition by Moody's lawyers to dismissal of the *Allmon* appeal, moreover, was premised on allegations made by them and other Moody's agents that the termination of Willie Allmon's status as policyholder had been engineered by Protective and was neither voluntary nor intentional. The findings and conclusions of the federal district court on remand conclusively establish those allegations to have been totally without merit.

ACCORDINGLY, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

ONE: Shearn Moody, Jr. has failed to purge himself of civil contempt of this Court.

TWO: Shearn Moody, Jr. has failed to comply with the Order of this Court entered April 30, 1975. Moody specifically failed, *inter alia*, to take the actions required by paragraphs (c), (e), (g) (h) and (j) as set forth on page 7 *et seq.* of said Order.

THREE: Shearn Moody, Jr. is hereby ordered to pay to Protective Life Insurance Company and the Receiver any and all costs, damages, expenses incurred by them as a result of Moody's failure to purge himself of civil contempt, including, but not limited to, those incurred by reason of the appeal in the *Allmon* action and the proceedings on remand in that action. As regards Protective, determination of the amount of such damages, etc., shall be made at the hearing presently scheduled for determination of the amount of the default judgment entered against Moody and in favor of Protective in the ancillary proceedings. As regards the Receiver, determination of the amount of such damages, etc., shall be made at the time of the hearing on the Receiver's petition for damages against Shearn Moody, Jr. in the ancillary proceedings.

FOUR: Protective is entitled to recover and Moody is hereby ordered to pay all costs and expenses incurred by reason of the investigation, preparation for, and conduct of the civil contempt proceedings, including, but not limited to, the proceedings herein on July 19, 1976. Protective's counsel is further entitled to recover and Moody is hereby ordered to pay reasonable attorneys' fees attributable to the civil contempt proceedings. The amount of such costs, expenses, and attorneys' fees to be awarded shall be determined by the Court at the hearing presently scheduled for determination of the amount of the default judgment.

FIVE: Shearn Moody, Jr. is hereby ordered to comply with any further orders, decrees, and judgments of this Court relating to this matter.

DONE this 1st day of November, 1976.

/s/ WM. C. BARBER
Circuit Judge

APPENDIX F

In the Supreme Court of Alabama

Case No. . . . . .

Ex Parte Shearn Moody, Jr.,

Petitioner,

IN RE: Civil contempt proceeding arising out of:

State of Alabama, ex rel. John G. Bookout, Commissioner of Insurance,

Plaintiff,

vs.

Empire Life Insurance Company of America, an Alabama Corporation,

Defendant.

Circuit Court Case Number 171-687,
Circuit Court of Jefferson County, Alabama

Petition for Writ of Certiorari

CLARK & JAMES
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NEWMAN, SHOOK & NEWMAN
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ROGERS, HOWARD, REDDEN & MILLS
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Attorneys for Petitioner

TO THE SUPREME COURT OF ALABAMA:

Comes now the Petitioner, Shearn Moody, Jr., and petitions the Court for a writ of certiorari to the Circuit Court of Jefferson County, Alabama, and in support of his petition respectfully represents and shows unto the Court as follows:

Purpose and Grounds for Petition

1. This petition for writ of certiorari is filed as an alternative means of reviewing an "Order and Decree" rendered by the Circuit Court of Jefferson County, Alabama, on November 1, 1976. A copy of the said "Order and Decree" is attached as Exhibit 1 of this petition. The Petitioner had filed notice of appeal to the Supreme Court of Alabama from the said "Order and Decree." If it be determined that appeal is not the proper procedure for reviewing the said judgment this petition for writ of certiorari is filed as an alternative.

Parties

2. Petitioner is over the age of 21 years and is a resident citizen of the State of Texas.

3. Protective Life Insurance Company is a corporation organized and existing under the laws of the State of Alabama.

4. The Honorable William C. Barber is a Judge of the Circuit Court of Jefferson County, Alabama, and was the judge who presided over the proceedings hereinafter described and was the judge who rendered the judgment which this petition seeks to review.

5. Charles H. Payne, the Commissioner of Insurance of the State of Alabama, is Receiver of Empire Life Insurance Com-

pany of America by appointment of the Circuit Court of Jefferson County, Alabama, in a case designated as Case Number 171-687 and styled "State of Alabama, ex rel. Charles H. Payne, Commissioner of Insurance, Plaintiff v. Empire Life Insurance Company of America, Defendant."

Statement of Facts

6. On June 16, 1976, the Circuit Court of Jefferson County, Alabama, the Honorable William C. Barber, Circuit Judge, presiding, entered an order *ex mero motu* directing the Petitioner to appear before that Court on July 19, 1976, and demonstrate whether or not he had purged himself of civil contempt of that court and had fully complied with an order of that court entered on April 30, 1975. A copy of the said order dated June 16, 1976, is attached hereto as Exhibit 2 to this petition. A copy of the said order entered on April 30, 1975, is attached hereto as Exhibit 3 to this petition.

7. A hearing was held before the said court on July 19, 1976. Following this hearing, and on November 1, 1976, the trial court entered a judgment styled "Order and Decree", a copy of which is attached hereto as Exhibit 1 to this petition.

8. At the time of the said hearing on July 19, 1976, the action referred to in the said "Order and Decree" of November 1, 1976, as the "Allmon" case had been finally terminated.

9. At the time of the said hearing on July 19, 1976, the receivership proceeding designated as Civil Action Number 171-687 in the Circuit Court of Jefferson County, Alabama which is referred to in the "Order and Decree" of November 1, 1976, had been terminated and the reinsurance agreement, which is also referred to in the said "Order and Decree," had been consummated.

Issues Presented for Review

10. The issues presented for review by this petition are as follows:

(a) Whether a civil contempt proceeding may be maintained after the orders and decrees which it purports to enforce or aid in enforcing have been fully executed.

(b) Whether a party adjudged guilty of civil contempt can be ordered to pay all costs and expenses incurred by reason of the investigation, preparation for, and conduct of civil contempt proceedings against him.

(c) Whether a party adjudged guilty of civil contempt can be ordered to pay attorneys' fees incurred by the parties bringing the contempt action against him.

(d) Whether a party adjudged guilty of civil contempt can be required to pay all costs, damages, and expenses incurred by other parties to the action as a result of his failure to purge himself of civil contempt.

(e) Whether or not the evidence supports the findings and orders of the said "Order and Decree" dated November 1, 1976.

Relief Sought

11. The relief sought by this petition is as follows:

(a) An order vacating and setting aside the judgment entitled "Order and Decree" dated November 1, 1976.

(b) An order rendering judgment in favor of the Petitioner on the matters described in the said "Order and Decree" dated November 1, 1976, and terminating further civil contempt proceedings against the Petitioner arising out of the said receivership

proceeding designated as Civil Action Number 171-687 in the Circuit Court of Jefferson County.

(c) Such other relief as may be appropriate in the premises.

WHEREFORE, THE PREMISES CONSIDERED, the Petitioner prays that the Court will grant this petition for a writ of certiorari, that Protective Life Insurance Company and the Honorable William C. Barber, Circuit Judge, be made respondents to this proceeding, that the Register of the Circuit Court of Jefferson County, Alabama, be directed and required to prepare and transmit to this Court a full and complete record or transcript of all proceedings therein, including a court reporter's transcript of all evidence and proceedings, including pre-trial hearings on motions, duly certified, so that this Court may review the said cause. And Petitioner prays that pending a determination by this Court of this matter that this Court will make and enter an order suspending the execution of the said judgment of the Circuit Court of Jefferson County, Alabama, until this Court decides the issues presented by this petition. And Petitioner prays for such other, further, different, or general relief as he may be entitled to in the premises.

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/s/ By (Illegible)

Attorneys for Petitioner

State of Alabama)
Jefferson County)

Before me, the undersigned authority in and for said County in said State, personally appeared William H. Mills, who is known to me, and who by me being first duly sworn deposes and says that he is one of the attorneys for the Petitioner in this cause, that he has read the averments of the foregoing petition and that the averments of fact stated therein are true and correct to the best of his knowledge, information, and belief.

/s/ WILLIAM H. MILLS

Sworn to and subscribed before me, this 23rd day of November 1976.

/s/ PAULA K. SAMPLE
Notary Public

Certificate of Service

I certify that I have served a copy of the foregoing Petition for Writ of Certiorari upon the Honorable William C. Barber, Circuit Judge, upon Cabaniss, Johnston, Gardner, Dumas & O'Neal, counsel for Protective Life Insurance Company, and upon James Webb, counsel for Charles H. Payne, Commissioner of Insurance of the State of Alabama, as Receiver of Empire Life Insurance Company of America, by mailing a copy of the same to each of them, properly addressed and with sufficient postage prepaid, this 23rd day of November 1976.

/s/ (Illegible)
Of Counsel for Petitioner

APPENDIX G

In the Circuit Court for the Tenth Judicial Circuit of Alabama

State of Alabama, ex rel, John G. Bookout, Commissioner of Insurance,

Plaintiff,

vs.

Empire Life Insurance Company of America, an Alabama Corporation,

Defendant.

Case No. 171-687

Notice of Appeal

Date of Judgment—November 1, 1976

Notice is hereby given that Shearn Moody, Jr., appeals to the Supreme Court of Alabama from the order designated as "Order and Decree" entered in this cause on November 1, 1976.

Security for costs of this appeal is styled with this notice of appeal.

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By (Illegible)
Attorneys for Shearn Moody, Jr.

11/23/76

Certified as a true copy

D. L. Cockrell

Register

APPENDIX H

In the Supreme Court of the State of Alabama

SC 1268; SC 1270; SC 931

Shearn Moody, Jr.,
Appellant,

vs.

State of Alabama, ex rel. Charles H. Payne, Commissioner of Insurance and Receiver of Empire Life Insurance Company of America,
Appellees.

Notice of Appeal to the Supreme Court of the United States

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In the Supreme Court of the State of Alabama

SC 1268: SC 1270: SC 931

Shearn Moody, Jr.
Appellant,

vs.

State of Alabama, ex rel. Charles H. Payne, Commissioner of Insurance and Receiver of Empire Life Insurance Company of America,
Appellees.

Notice of Appeal to the Supreme Court of the United States

TO THE HONORABLE SUPREME COURT OF ALABAMA:

Notice is hereby given that Shearn Moody, Jr., the Appellant above named, hereby appeals to the Supreme Court of the United States from the judgment of the Alabama Supreme Court entered in the above entitled and numbered cause on February 11, 1977, which judgment became a final judgment for purposes of appeal to the Supreme Court of the United States on April 22, 1977, the date the timely Application for Rehearing filed by Shearn Moody, Jr. was overruled by the Alabama Supreme Court.

This Appeal is taken pursuant to 28 U.S.C. §1257 (2) (1970).

Respectfully submitted,

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Attorneys for Appellant
Shearn Moody, Jr.

Certificate of Service

I hereby certify that on the 28th day of April, 1977, a copy of the Notice of Appeal to the Supreme Court of the United States was served upon the following counsel for all parties to this cause by mailing a copy of the same, postage prepaid, to each of them:

Mr. Charles H. Barnes
Assistant Attorney General
State Department of Insurance
Montgomery, Alabama

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/s/ Frank G. Newman